Supreme Court, U.S.
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In The

# Supreme Court of the United States

CIPRIANO GALVAN, JUAN M. ALVAREZ, ARMANDO TELLEZ, RALPH G. MACIEL, RONALD MASON, SANTIAGO QUINONES, ROBERT VASQUEZ, JUAN MARTINEZ, CARLOS M. ROJAS, FRANK G. BESA, GILBERTO CAMACHO, REYNALDO DE LEON, HECTOR BUSTOS, JOE DIMAS, RICHARD JIMENEZ, ROBERT RODRIGUEZ, NICOLAS CAMACHO, FRANK GONZALEZ, LOUIE ROJAS,

*Petitioners,*

v.

UNITED STATES DEPARTMENT OF DEFENSE, WILLIAM S. COHEN, Secretary, Department of Defense, DEPARTMENT OF THE UNITED STATES AIR FORCE, F. WHITTEN PETERS, Acting Secretary, United States Air Force, SAN ANTONIO LOGISTICS CENTER, PAUL L. BIELOWICZ, Major General, San Antonio Logistics Center, OFFICE OF PERSONNEL MANAGEMENT,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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96 pp

## QUESTION PRESENTED FOR REVIEW

Did the Fifth Circuit Court of Appeals err by affirming U.S. District Court's grant of summary judgment for the Respondents despite the government's failure to adhere to the expressed will of Congress in 5 U.S.C. § 1302 and 5 U.S.C. § 3502, as well as the related regulations that veterans enjoy preferential treatment in federal government employment, when the government did not give meaningful effect to these mandates through its priority placement program during a reduction in force at Kelly Air Force Base that involuntarily separated the Petitioners from their employment without providing them with reemployment in the San Antonio, Texas metropolitan area after the government had provided such reemployment to non-preference eligible persons?

## LIST OF INTERESTED PARTIES

The following listed persons, associates, military agencies, and government agencies and their counsel have an interest in the outcome of this litigation:

1. Cipriano Galvan is a resident of San Antonio, Bexar County Texas and a Petititoner.
2. Juan M. Alvarez is a resident of San Antonio, Bexar County Texas and a Petitioner.
3. Armando Tellez is a resident of San Antonio, Bexar County Texas and a Petitioner.
4. Ralph G. Maciel is a resident of San Antonio, Bexar County Texas and a Petitioner.
5. Ronald Mason is a resident of San Antonio, Bexar County Texas and a Petitioner.
6. Santiago Quinones is a resident of San Antonio, Bexar County Texas and a Petitioner.
7. Robert Vasquez is a resident of San Antonio, Bexar County Texas and a Petitioner.
8. Juan Martinez is a resident of San Antonio, Bexar County Texas and a Petitioner.
9. Carlos M. Rojas is a resident of San Antonio, Bexar County Texas and a Petitioner.
10. Frank G. Besa is a resident of San Antonio, Bexar County Texas and a Petitioner.
11. Gilberto Camacho is a resident of San Antonio, Bexar County Texas and a Petitioner.
12. Reynaldo De Leon is a resident of San Antonio, Bexar County Texas and a Petitioner.

**LIST OF INTERESTED PARTIES** – Continued

13. Hector Bustos is a resident of San Antonio, Bexar County Texas and a Petitioner.

14. Joe Dimas is a resident of San Antonio, Bexar County Texas and a Petitioner.

15. Richard Jimenez is a resident of San Antonio, Bexar County Texas and a Petitioner.

16. Robert Rodriguez is a resident of San Antonio, Bexar County Texas and a Petitioner.

17. Nicolas Camacho is a resident of San Antonio, Bexar County Texas and a Petitioner.

18. Frank Gonzalez is a resident of San Antonio, Bexar County Texas and a Petitioner.

19. Louie Rojas is a resident of San Antonio, Bexar County Texas and a Petitioner.

20. David Van Os is the counsel of record for the Petitioners.

21. David Van Os & Associates, P.C. is Mr. Van Os' law firm and a professional corporation.

22. The United States Department of Defense is a federal agency and Respondent.

23. Donald H. Rumsfeld is Secretary of Defense and a Respondent.

24. The United States Air Force is a division of the United States' armed services and a Respondent.

25. F. Whitten Peters is Acting Secretary of the United States Air Force and a Respondent.

**LIST OF INTERESTED PARTIES** – Continued

26. The San Antonio Air Logistics Center is a subdivision within the United States Air Force and a Respondent.

27. Major General Paul L. Bielowicz is the ranking officer at the San Antonio Air Logistics Center and a Respondent.

28. The Defense Logistics Agency is a federal agency and a Respondent.

29. The United States Office of Personnel Management is a federal agency and a Respondent.

30. Robert Keith Shaw-Meadow was the United States Attorney representing the various government agencies and officials named as Defendants-Appellees in the courts below.

31. The Solicitor General of the United States is the attorney representing the various government agencies and officials named as Respondents in this Petition for Certiorari in the Supreme Court of the United States.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Question Presented for Review | i |
| List of Interested Parties | ii |
| Table of Contents | v |
| Table of Authorities | vi |
| Opinions Below | 1 |
| Statutes and Rules Involved | 1 |
| Statement of the Basis for Jurisdiction | 2 |
| Statement of the Case | 4 |
| Argument | 8 |
| Conclusion | 19 |
| Appendix | App. 1 |

## TABLE OF AUTHORITIES

Page

CASES

*Brannon v. Elder*, 341 U.S. 277 (1951) ..... 14, 15

*Brown v. Dept. of Veterans Affairs*, 247 F.3d 1222 (Fed.Cir.2001) ..... 18, 19

*Crowley v. United States*, 527 F.2d 1176 (Ct.Cl. 1975) ..... 10, 11

*Galvan v. U.S. Dept. of Defense*, 2001 WL 699086 (W.D.Tex. May 31, 2001) (NO. CIV. A.SA00CA517 HG) ..... 1

*Galvan v. U.S. Dept. of Defense*, 48 Fed.Appx. 102, ___F.3d___ (5th Cir.(Tex.) Aug. 12, 2002) (TABLE, NO. 01-50930) ..... 1

*Hilton v. Sullivan*, 334 U.S. 323 (1948) ..... 10, 14, 15, 16

STATUTES

5 U.S.C. § 1302 ..... *passim*

5 U.S.C. § 3330b ..... 5

5 U.S.C. § 3502 ..... *passim*

28 U.S.C. § 1254(1) ..... 3

28 U.S.C. § 1331 ..... 5

28 U.S.C. § 1346(a)(2) ..... 5

28 U.S.C. § 1361 ..... 5

28 U.S.C. § 1651(a) ..... 5

28 U.S.C. § 2201 ..... 5

38 U.S.C. § 4214(a) ..... 18

# TABLE OF AUTHORITIES

Page

MISCELLANEOUS

U.S. House Report 105-40, Part I (March 20, 1997) ... 11, 12

## OPINIONS BELOW

The United States Court of Appeals for the Fifth Circuit's unpublished, per curiam opinion (by Judges Wiener, Garza and Parker) affirming the decision of the District Court for the Western District of Texas, is cited as *Galvan v. U.S. Dept. of Defense*, 48 Fed.Appx. 102, ___ F.3d ___ (5th Cir.(Tex.) Aug. 12, 2002) (TABLE, NO. 01-50930), and is reproduced at App. 1.

The United States District Court for the Western District of Texas, San Antonio Division's Memorandum and Recommendation of United States Magistrate Judge (per Nowak) is published as *Galvan v. U.S. Dept. of Defense*, 2001 WL 699086 (W.D.Tex. May 31, 2001) (NO. CIV. A.SA00CA0517 HG), and is reproduced at App. 2.

## STATUTES AND RULES INVOLVED

5 U.S.C. § 1302, provides:

(a) The Office of Personnel Management, subject to the rules prescribed by the President under this title for the administration of the competitive service, shall prescribe regulations for, control, supervise, and preserve the records of, examinations for the competitive service.

(b) The Office shall prescribe and enforce regulations for the administration of the provisions of this title, and Executive orders issued in furtherance thereof, that implement the Congressional policy that preference shall be given to preference eligibles in certification for appointment, and in appointment, reinstatement, reemployment, and retention, in the competitive service in

Executive agencies, permanent or temporary, and in the government of the District of Columbia.

(c) The Office shall prescribe regulations for the administration of the provisions of this title that implement the Congressional policy that preference shall be given to preference eligibles in certification for appointment, and in appointment, reinstatement, reemployment, and retention, in the excepted service in Executive agencies, permanent or temporary, and in the government of the District of Columbia.

5 U.S.C. § 3502, due to its length, is reproduced at App. 8.

## STATEMENT OF THE BASIS FOR JURISDICTION

Nineteen veterans of the United States military who were employees of Kelly Air Force Base were involuntarily separated from their employment with the United States Air Force and Department of Defense over the course of 1999 during a reduction in force required by the base's closure. These veterans, hereinafter referred to as Petitioners, were at all times preference eligible within the meaning of 5 U.S.C. § 1302. The Respondents have never contested their entitlement to the veterans' preference and have stated that Petitioners were provided their rights pursuant to 5 U.S.C. § 3502. Through a Priority Placement Program, the Petitioners could have secured meaningful opportunities to continue their federal civil service careers if the Respondents had utilized a program that adhered to the mandates of Congress expressed in 5 U.S.C. § 1302 and 5 U.S.C. § 3502.

In the U.S. District Court of the Western District of Texas, the Petitioners had clear standing to directly challenge the Office of Personnel Management's failure to enforce veteran preference regulations as required by § 1302. Petitioners' statutory right to veterans' preference derives from 5 U.S.C. §§ 1302 and 3502. (App. 6, 8)

Respondents filed a Motion to Dismiss, or in the Alternative, Summary Judgment, and the U.S. District Court for the Western District of Texas granted Respondents' Motion for Summary Judgment on August 16, 2001. (App. 3, 4, 5) The Petitioners appealed to the Fifth Circuit Court of Appeals which affirmed the district court's judgment in an unpublished per curiam decision by Judges Wiener, Garza and Parker on August 12, 2002. (App. 1, 2) This Petition for Writ of Certiorari is filed within 90 days of the decision of the United States Court of Appeals for the Fifth Circuit, and is therefore timely under Rule 13.3 of this Court.

Petitioners now seek a Writ of Certiorari from the Supreme Court of the United States pursuant to 28 U.S.C. § 1254(1). 28 U.S.C. § 1254(1) states in relevant part:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

Petitioners request that the Supreme Court of the United States grant their Petition for Certiorari because the Fifth Circuit Court of Appeals has decided an important question of federal law that has not been, but should be, settled by the Supreme Court of the United States. Petitioner's request for Writ of Certiorari presents a compelling issue with respect to this country's long-standing policy of

providing veterans of the armed forces with a preference in federal employment.

The Fifth Circuit Court of Appeals erred when it upheld the U.S. District Court's grant of motion for summary judgment despite the federal government's failure to adhere to the expressed will of Congress in 5 U.S.C. § 1302 and 5 U.S.C. § 3502, that veterans enjoy preferential treatment in federal government employment, when the government did not give meaningful effect to these mandates through its priority placement program during a reduction in force at Kelly Air Force Base that involuntarily separated veterans from their employment without providing them with reemployment in the San Antonio, Texas metropolitan area after the government had provided such reemployment to non-preference eligible persons.

Petitioners request that the Supreme Court grant their Petition for Certiorari because this case presents a compelling question of federal veterans' preference rights that has not been, but should be, settled by the Supreme Court of the United States. Otherwise, the benefits intended by Congress for veterans shall be completely nullified because federal regulations and policies may operate to diminish veterans' retention opportunities.

Service shall be made upon the Solicitor General of the United States pursuant to Rule 29.4(a) of the Rules of the Supreme Court of the United States.

## STATEMENT OF THE CASE

Nineteen veterans of the United States military who were employees of Kelly Air Force Base, Cipriano Galvan,

Juan M. Alvarez, Armando Tellez, Ralph G. Maciel, Ronald Mason, Santiago Quinones, Robert Vasquez, Juan Martinez, Carlos M. Rojas, Frank G. Besa, Gilberto Camacho, Reynaldo De Leon, Hector Bustos, Joe Dimas, Richard Jimenez, Robert Rodriguez, Nicolas Camacho, Frank Gonzalez, and Louie Rojas, referred to as "the Kelly Veterans," preference eligible persons within the meaning of 5 U.S.C § 1302, were involuntarily separated from their employment with the United States Air Force and Department of Defense over the course of 1999. (R. 32-52).

The Petitioners filed suit in federal court basing jurisdiction on various statutes: 28 U.S.C. § 1331, as an action arising under the laws of the United States; 28 U.S.C. § 1346(a)(2), as a claim against the United States founded upon any act of Congress, or any regulation of an executive department; 28 U.S.C. § 1361, as an action in the nature of mandamus to compel officers or employees of the United States or any agency thereof to perform a duty owed to plaintiffs; 28 U.S.C. § 1651(a), as seeking issuance of all writs necessary in aid of the court's jurisdiction; 28 U.S.C. § 2201, as seeking declaratory judgment; and 5 U.S.C. § 3330b (Veterans' Employment Opportunities Act of 1998), as a suit over violations of veterans' preference laws. (App. 7)

On July 13, 1995, the President of the United States, pursuant to Public Law 101-510, the Defense Base Closure and Realignment Act of 1990, issued a decision to close Kelly Air Force Base. In alleged implementation of that decision, the Respondents subjected the Petitioners to an administrative procedure known as "reduction in force" ("RIF"), culminating in involuntary separation or demotion of the Plaintiffs from their civilian service positions.

The Respondents instituted a job retention program known as the Priority Placement Program ("PPP"). Through the PPP, civilian employees of Department of Defense installations who have received RIF notices may seek placement in positions throughout the Department of Defense, including all installations of all branches of the armed services, in order to be retained in their federal civilian employment. Through the PPP, the Petitioners could have secured meaningful opportunities to continue their federal civil service careers if the Respondents had utilized a program that adhered to the mandates of Congress expressed in 5 U.S.C. § 1302 and 5 U.S.C. § 3502 (App. 6, 8).

The PPP, however, gave no preference to veterans and did not honor veterans' preference rights in any respect in its placement and retention decisions. Hundreds of non-preference eligible employees of the Respondents at Kelly Air Force Base have been offered retention in employment in valuable federal civilian positions through the PPP in lieu of separation from employment. Each Petitioner applied for PPP treatment but was ignored and disregarded despite his preference eligible status. By refusing and failing to consider the Petitioners' preference standing in PPP retention decisions, the Respondents deprived the Petitioners of valuable retention opportunities and effectively gave hundreds of non-preference eligible employees preference over the Petitioners.[1] Furthermore, by awarding

[1] At the same time that 176 preference eligible persons were facing job loss in September 1999 because they were not afforded positions through the PPP, 368 non-preference eligible persons had been granted positions through the PPP that enabled them to retain employment in the competitive service. (R. 314). Many of the positions that were

(Continued on following page)

valuable positions to hundreds of non-preference eligible persons through the PPP, the Respondents deprived the Petitioners of further opportunities for placement in such positions through RIF procedures and other methods. (R. 314).

This grave injustice was the result of a situation that would be ironic if it had not worked a serious hardship upon the Petitioners: the veterans' preference they were afforded by the government prevented the RIF from separating them from their employment at a time when there were jobs available in the San Antonio metropolitan area that they could have received through the PPP. They retained employment with Respondents at Kelly AFB while their coworkers were separated, but their coworkers were placed in positions within the San Antonio area as a result of the PPP. (R. 83-84). By the time the RIF separated the Kelly Veterans from their employment and they became qualified to receive employment through the PPP, there were no positions left in the San Antonio metropolitan area for the Petitioners. (R. 311-13). As such, their

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awarded to the 368 non-veterans through the PPP were in other Department of Defense installations in the San Antonio metropolitan area, such as Randolph Air Force Base, Lackland Air Force Base, Brooks Air Force Base, and Fort Sam Houston. (Id., R. 359-372). This outcome illustrates the direct impact of the Respondents' admitted failure to consider preference eligible status when applying the PPP. Literally, the majority of – if not all – Department of Defense jobs within the local commuting area were taken by the PPP – thus rendering RIF and other placement programs wholly valueless to the average Department of Defense veteran preference eligible employee. In sum, over two non-preference eligible persons were awarded positions through the PPP for every preference eligible person who was denied a position.

preference as applied in this situation ultimately worked to defeat the intent of Congress for the federal government to provide veterans with preferential treatment in regards to federal employment.

Petitioners were at all times preference eligible persons within the meaning of 5 U.S.C. § 1302. (R.32-52) (App. 6). The Respondents have never contested their entitlement to the veterans' preference, and have stated that Petitioners were provided their rights pursuant to 5 U.S.C. § 3502, but in the fashion described above. (App. 8) (R. 83-84). Petitioners argue that federal statutes require that veterans be accorded preferential treatment within employment retention programs. Further, due to the way that the PPP was implemented, preferential treatment guaranteed by statute was wholly done away with in violation of the law.

## ARGUMENT

The clear and unequivocal intent of Congress regarding the employment of veterans by the federal government is that veterans receive preferential treatment over non-veterans. Specifically, the law requires that veterans be given preferential treatment with regard to retention. In the case at bar, the federal government's administration of the PPP during a base closure circumvented the preferential treatment guaranteed by law to the Kelly Veterans, who were severely disadvantaged.

## I.

**Petitioners' legal claims are based upon veterans' preference laws that clearly state the statutory responsibilities for implementing preferences for veterans regarding employment opportunities.**

Petitioners' legal claims are based upon veterans' preference laws codified in 5 U.S.C. §§ 1302 and 3502. 5 U.S.C. § 1302 was enacted to

> "implement the Congressional policy that preference shall be given to preference eligible individuals (such as veterans) . . . in retention, in the competitive service in executive agencies." 5 U.S.C. § 1302. (App. 6)

This policy is reiterated in 5 U.S.C. § 3502(c)'s mandate that an

> "employee who is entitled to retention preference . . . is entitled to be retained in preference to other competing employees." 5 U.S.C. § 3502(c). (App. 8)

Congressional intent is clear on the matter. The retention of veterans is not subject to the discretion of the Department of Defense. Retention is, in fact, subject to the language of the statute.

Title 5 U.S.C. § 1302, clearly mandates that the OPM "*prescribe and enforce regulations for the provisions of this title*, and Executive orders issued in furtherance thereof, *that implement the Congressional policy that preference shall be given to preference eligibles* in certification for appointment, and in appointment, *reinstatement, reemployment, and retention in the competitive service in Executive agencies*, permanent or temporary, and in the government of the District of Columbia." (Emphasis

added) (App. 6). No exception is afforded to any Executive agency, the Respondents, or the PPP from this Congressional directive.

Congress delegated authority to OPM so that OPM oversees appropriate veterans' preference regulations. Congress specifically charged OPM – not the Department of Defense – with the mandate to prescribe and enforce regulations relating to the veterans' preference provisions of Title 5.[2]

Here, however, OPM failed to prescribe and enforce such regulations in relation to the Petitioners and other veterans similarly situated. OPM's failure to prescribe and enforce appropriate regulations permitted the Department of Defense to circumvent the Congressional policy according preferences favoring eligible veterans.

Granted, veterans' preference and benefits are not boundless. The U.S. Court of Claims recognized that veterans' preference rights are not without limits. *Crowley v. United States*, 527 F.2d 1176, 1182-83 (Ct.Cl. 1975).[3]

However, Petitioners have requested specific relief accorded by the statutes. Namely, they ask to be given preference in retention based on their status as veterans.

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[2] *See Hilton v. Sullivan*, 334 U.S. 323, 339 (1948) (noting that it is the duty of the Court to interpret the Act, not to overrule the Congressional policy).

[3] *Crowley* dealt in part with veterans attempting to assert the veterans' preference rights to retain temporary promotions they had received. The *Crowley* court noted that the VPA is applicable in specific instances "and for plaintiffs to benefit therefrom they must show themselves to be clearly within the intended ambit of those provisions." *Id.* at 527 F.2d 1176, 1182-83 (Ct.Cl. 1975).

The *Crowley* decision strongly supports Plaintiffs' contention that the Department of Defense acted in derogation of Congress's mandate in 5 U.S.C. § 1302(b) and 5 U.S.C. § 3502(c). (App. 6, 8)

## II.

**The legislative history behind the Veterans' Employment Opportunities Act of 1998 demonstrates that pre-existing veterans' preference statutes mandate preferential treatment of veterans.**

In the Fifth Circuit Court of Appeals' per curiam decision, the court erred when it relied upon the legislative history of the Veterans' Employment Opportunities Act of 1998. The court noted that this legislative history

> ". . . demonstrated that Congress had considered, but did not enact, legislation in 1997 that would have provided protection beyond § 3502 by extending veterans' preference rights to the PPP. . . . " (App. 1)

The appellate court's language echoed the U.S. District Magistrate's Memorandum and Recommendation of May 31, 2001. The Magistrate cited House Report 105-40, Part I (March 20, 1997) stating that the legislation in 1997

> ". . . which would have granted the veterans' preference rights plaintiffs seek in this case, however, was rejected and never became law. The consideration by Congress, but failure to pass into law, of a more specific veterans' preference statutory language, applying expressly to the PPP, further supports my conclusion that there is no legal basis for the veterans' preference sought by plaintiffs in this case." (App. 2)

However, the Petitioners respectfully submit that the Magistrate's Memorandum and Recommendation highlighted and misplaced its reliance upon a mere portion of the debates surrounding veterans' preference rights. Based upon the legislative history of the VEOA of 1998, there *is* a legal basis for the veterans' preference benefits that Petitioners seek. Veterans' preference laws predating 1998 comprise the legal basis upon which veterans base their claims.

The existence of an underlying legal basis for veterans' rights is evident in House Report 105-40, Part I. (App. 9) Prior to 1998, Congress considered creating new, supplemental rights that would augment pre-existing statutory guarantees while providing for methods of redress in the event that veterans' preference rights were violated.

The legislative history shows that Congress contemplated existing veterans' preference laws and considered augmenting them by "adding teeth" to the pre-existing statutes. Veterans' advocates and Congressional Committee members alike recognized the existence of these rights and lamented their deterioration and poor enforcement thereof. Many advocates voiced concerns about the weakening of veterans' rights in a poor economic climate replete with evasions of the law. The committee report stated that

> "Testimony at these hearings revealed that veterans [sic] preference in the Federal workplace is often ignored or circumvented and that its continued viability is threatened on several fronts." (App. 9).

Specifically, Mr. Frelinghuysen testified that:

> "My chief concern is that veterans' preference is being circumvented by many Federal agencies

> while they are downsizing through what is known as the designer reduction in force, or designer RIF." (App. 9)

Further testimony supported this assertion. Mr. Burton testified that:

> "Unfortunately, the Civil Service Subcommittee has found that the benefits of the original veterans' preference laws have been eroded. Agencies often ignore or find ways to circumvent veterans' preference directives." (App. 9)

Mr. Stump likewise testified. He noted that:

> "Over the years, some federal agencies have become very inventive when trying to avoid veterans' preference laws and regulations. Recently, with the pressure to downsize, agencies and hiring managers have found new ways to circumvent veterans' preference. A major reason agencies and hiring managers have felt free to pursue such tactics is that there was no real consequence for their illegal actions." (App. 9)

As the U.S. Magistrate noted, the legislation that would have "added teeth" to veterans' preference laws did not become law. The 1997 legislation merely would have augmented old rights, without promulgating new ones. Congress's failure to adopt the entire bill which sought to provide supplemental rights does not mean by its non-adoption of the law that pre-existing veterans' preference rights have been stripped away. Thus far, veterans' preference rights during RIFs may not have been specifically enumerated; however, they are clearly encompassed by the general preferences accorded veterans regarding their retention and release.

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## III.

**The Petitioners were in the relevant competitive civil service group, and they have clear standing to directly challenge OPM's failure to create and enforce veterans' preference regulations as required by § 1302.**

In its decision in *Brannon v. Elder*, 341 U.S. 277 (1951), the Supreme Court held that the pertinent civil service regulations contained "the term 'competing' employees, which necessarily implies that veteran's preference operates only within a defined group." *Brannon*, 341 U.S. at 282. Accordingly, the Court merely held that the veterans in *Brannon* did not have an absolute priority over all other veterans because of the long-standing distinction between competitive groups. *Id.* at 285. Further, the Court cited authoritatively its decision in the *Hilton v. Sullivan* case, where the Court in fact "*upheld* the retention-preference regulations *insofar as they granted veterans with classified status an absolute priority over non-veterans of the same status* regardless of length of service." *Id.* at 282, citing *Hilton v. Sullivan,* 334 U.S. 323 (1948). (Emphasis added).

The Petitioners presently before the Court were in the relevant competitive civil service group. Their statutory right to the veterans' preference is derived from 5 U.S.C. §§ 1302 and 3502(a), (b), and (c). (App. 6, 8) 5 U.S.C. § 3502(a) mandates OPM to prescribe regulations for the *release* of competing employees; (b) covers the *retention* of preference eligibles with a disability of 30% or more; (c) covers *retention* of other preference eligible persons. Each provision of § 3502 previously cited distinctly acknowledges and entitles preference eligible employees to be retained in preference to other competing employees. (App.

8) Again, there is nothing exempting the PPP from § 3502. (App. 8)

The decisions in both *Brannon* and *Hilton* support Petitioners' preference right in the PPP. To hold otherwise would totally negate or nullify their statutory right to a retention preference under § 3502. (App. 8) The Court further in *Hilton* aptly referred to this principle as "the long standing absolute retention preferences of veterans." *Hilton* at 348. Modern statutes simply reiterate that historical preference. 5 U.S.C. § 1302; 5 U.S.C. § 3502(c). (App. 6, 8) The Petitioners were denied their retention in federal employment in the case at bar by operation of the Respondents' procedures.

Petitioners contend that the Department of Defense should have acted as the Government did in *Hilton* and provided the Kelly Veterans with the full benefit of their statutory veterans' preference. Proper treatment would have required affording them earlier opportunities at San Antonio-area employment through a placement policy that took into account their status as veterans.

*Hilton* addresses the preference accorded veterans over non-veterans. (R. 251, n. 61). *Hilton* upheld the downsizing of an employee who lacked a veteran's preference. *Hilton* at 326. The Court recognized that Congress passed the bill (the predecessor of the current law at issue in this case) "with full knowledge that the long standing absolute retention preferences of veterans would be embodied in the Act" based on the Act's extensive legislative history. *Id.* at 339. Here, Petitioners contend that the Department of Defense should have fulfilled its duties toward the Petitioners as the Government did in *Hilton* by

providing Petitioners with the full benefit of their statutory veterans' preference, which would have afforded them earlier opportunities at San Antonio-area employment.

Petitioners assert that the PPP denies them the right to retention that the RIF policy would accord them if it were the sole retention policy used by the Department of Defense. The Department of Defense uses the PPP as

> "the primary vehicle for placing employees who have been affected adversely . . . by such actions as, but not limited to, reduction-in-force (RIF), base closures, realignments, consolidations, contracting-out actions, position classification decisions, rotations from overseas assignments, and transfers of function (TOF)." (R. 303).

Every retention and reemployment placement action within the Department of Defense is administered through the PPP according to the Department of Defense's own policy statement. *Id.* Moreover, other Department of Defense agency programs are not permitted to establish duplicative programs. *Id.* Further, the Department of Defense gives PPP referrals precedence over other statutory and regulatory programs, such as the Replacement Priority List (RPL) and the Interagency Career Transition Assistance Plan (ICTAP). (R. 309-10). As a result, the alleged "non-statutory, non-regulatory" placement program, as administered by Respondents, effectively trumped other programs, bypassing and ignoring veteran preference rights, altogether nullifying them.

Typically, veterans are usually "retained" in their current positions during a RIF until the final reduction. Ideally, the veteran receives the benefit of retention in the veteran's old job longer than any non-veterans around him

or her. The veteran is then able to use his or her veterans' preference to transfer or "bump" into other surrounding positions that are not being lost when the downsizing reaches him or her. This sequence of events operates to give the veteran maximum protection as Congress intended. His or her veteran's preference makes the veteran the last employee reached in the downsizing, and then provides him or her with the ability to remain employed at the installation through the pre-emptive right to bump into jobs that remain after the downsizing.

However, the circumstances which Petitioners faced were less than ideal. The base closure operated in conjunction with the PPP to circumvent veterans' preference. In the case of the Kelly base closing, a similarly situated veteran sat and watched while the PPP was used to award available jobs to non-veterans. This left no positions available for the veteran when the RIF procedures reached him or her because the positions had already been awarded to non-veterans through the PPP. The benefits intended by Congress for veterans were completely nullified for the Kelly Veterans because Respondents' regulations and policies diminished their retention opportunities.

The PPP is clearly a retention program, enabling civilians to retain employment. While the RIF process may give veterans' preference on paper, the PPP takes it away in practice before it ever becomes a benefit. The Department of Defense administration of the PPP essentially rendered the valuable right of veterans' preference throughout Title 5 useless and meaningless. The Department of Defense successfully circumvented all federally established veterans' rights, wholly nullifying them with the creation and implementation of the PPP. As a result, the RIF entitlement is a mere promise unfulfilled. This

outcome is clearly contrary to the intent of Congress, its laws, and the legislative history underlying them.

Respondents' Actions are not sanctioned by *Brown v. Dept. of Veteran Affairs*, 247 F.3d 1222 (Fed.Cir. 2001). In *Brown*, the veteran was passed over for promotion in the Department of Veteran Affairs ("DVA"). The Court ruled that under 38 U.S.C. § 4214(a), veterans do not receive preference when seeking promotions or transfers. *Brown*, 247 F.3d at 1223. The Court noted that a promotion is sought by a person already employed by the agency and therefore did not address the issues of initial employment or retention, which were the only two categories that the veterans' preference applied to under the applicable statutes and regulations. *Id.* The Court noted that promotions are subject to supervisory discretion not judicial review. *Id.* at 1224. Therefore, any decision to promote a non-veteran employee over Brown was subject to the discretion of the supervisor and did not violate the Veterans' Preference Act, "VPA."

*Brown* is distinguishable from Petitioners' situation. *Brown* deals with incumbent employees seeking voluntary promotions or transfers, rather than employees seeking retention of employment, as with the case at bar. Petitioners were served with RIF notice in 1999. They understood that their jobs were being dissolved in the RIF process. They registered with PPP to find suitable placement within the agency. They should have been accorded a veteran's preference because the veterans in essence were trying to retain employment within the agency. Thus, this situation would fall under the initial employment category or retention category that *Brown* stated the veterans' preference would apply to under the VPA. *Id.* at 1223.

Petitioners were not seeking a transfer or promotion; their need for subsequent employment was borne out of the necessity of the base's closure. The application of the PPP in this case is not as a method of allotting promotions, like the VPA's program upheld in *Brown*. The PPP was used as a retention program in this case, and the PPP is legally required under the VPA, 5 U.S.C. § 1302(b) and 5 U.S.C. § 3502(c) to provide preferential placement for veterans seeking to retain employment within the Department of Defense. (App. 6, 8)

## CONCLUSION

The fundamental issue at the heart of this case is whether Congress's mandate, codified in 5 U.S.C. § 1302(b) and 5 U.S.C. § 3502(c) that veterans receive a preference in retention, is extensive enough so as to afford Petitioners preferential treatment in retaining federal employment. Petitioners' reading of Congress's intent accords them a right to preferential retention employment with the government in the San Antonio metropolitan area before non-veterans receive such employment. The Petitioners are in essence being penalized by the fact that their preference as veterans spared them from being fired, while at the same time serving to prohibit them from obtaining employment that would have retained them in federal civil service. The Supreme Court of the United States should reject the lower courts' misplaced reliance upon a portion of the legislative history behind the Veterans' Employment Opportunities Act of 1998 and give weight to Congress's clearly articulated commitment to accord preferential treatment to veterans in the retention of their federal employment due to their military service.

For all the foregoing compelling reasons, the Petitioners respectfully urge the Court to grant their Writ of Certiorari.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 01-50930

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CIPRIANO GALVAN; JUAN M. ALVAREZ; ARMANDO TELLEZ; RALPH G. MACIEL; RONALD MASON; SANTIAGO QUINONES; ROBERT VASQUES; JUAN MARTINEZ; CARLOS M. ROJAS; FRANK G. BESA; GILBERTO CAMACHO; REYNALDO DE LEON; HECTOR BUSTOS; JOE DIMAS; RICHARD JIMENEZ; ROBERT RODRIGUEZ; NICOLAS CAMACHO; FRANK GONZALEZ; LOUIE ROJAS,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF DEFENSE; WILLIAM S. COHEN, Secretary, Department of Defense; DEPARTMENT OF THE UNITED STATES AIR FORCE; F. WHITTEN PETERS, Acting Secretary, United States Air Force; SAN ANTONIO LOGISTICS CENTER; PAUL L. BIELOWICZ, Major General, San Antonio Logistics Center; OFFICE OF PERSONNEL MANAGEMENT,

Defendants-Appellees.

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Appeal from the United States District Court
for the Western District of Texas, San Antonio Division
(SA-00-CV-517)

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(Filed Aug. 12, 2002)

Before WIENER, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:*

Appellants are nineteen individuals who were involuntarily separated from their civil service employment by the Department of Defense ("DOD") and the Department of the Air Force ("Air Force") as the result of a reduction in force ("RIF") at Kelley Air Force Base, San Antonio, Texas, which eventually closed altogether. Appellants ask us to reverse the district court's summary judgment dismissing their claims that, as preference-eligible veterans, they were not accorded their preferential rights. After the previous suit was dismissed for failure to exhaust administrative remedies, appellants filed administrative complaints with the Department of Labor ("DOL") contending that the DOD's Priority Placement Program ("PPP") failed to give them the veterans' preference to which they were entitled under 5 U.S.C. §§ 1302 and 3502. The DOL rejected the claims because, as a non-statutory program, the PPP did not require that these veterans be afforded such preferences during the RIF.

After the instant action was filed, the defendants moved to dismiss the complaint or, alternatively, for summary judgment, arguing that the statutory veterans' preference applied only to determinations of job retention *during* the RIF, which preference the appellants concededly received. Defendants contended that there was no

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

legal basis for engrafting a further preference on the PPP, which is a non-statutory, non-regulatory program instituted in the discretion of the DOD.

In granting summary judgment to the defendants, the district court adopted the Magistrate Judge's Report and Recommendations, which concluded, *inter alia*, that appellants failed to demonstrate a statutory basis for a veterans' preference in the PPP; that the PPP is an internal program of the DOD not governed by any regulation, statute, or rule; that the PPP is neutral in operation, matching job skills and experience with specifications of available agency positions; that § 1302 granted the Office of Personnel Management ("OPM") authority to issue necessary regulations for implementation of the Veterans' Preference Act and that § 3502 defined the rights of preference-eligible veterans only in a RIF situation; that appellants were given preference as required by § 3502 during the September, 1999 RIF by being allowed to retain their positions for periods of time longer than non-veteran employees; that the legislative history of the Veterans' Employment Opportunities Act of 1998 demonstrated that Congress had considered, but did not enact, legislation in 1997 that would have provided protection beyond § 3502 by extending veterans' preference rights to the PPP; that, because the PPP deals only with the movement of incumbent employees from jobs within the DOD, it is subject to that department's discretion; and that under the instant circumstances, the Veterans' Preference Act does not accord appellants any preference rights.

We have now reviewed the record on Appeal and the facts and the law as analyzed by able counsel in their appellate briefs and oral arguments, as a result of which we are convinced that the district court providently

granted the defendants' summary judgment motion to dismiss the appellants' action. Principally for the reasons expressed by the magistrate judge, we affirm the judgment of the district court in all respects.

AFFIRMED.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF TEXAS**
**SAN ANTONIO DIVISION**

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| **CIPRIANO GALVAN, JUAN M. ALVAREZ, ARMANDO TELLEZ, RALPH G. MACIEL, RONALD MASON, SANTIGATO QUINONES, ROBERT VASQUEZ, JUAN MARTINEZ, CARLOS M. ROJAS, FRANK G. BESA, GILBERTO CAMACHO, REYNALDO DE LEON, HECTOR BUSTOS, JOE DIMAS, RICHARD JIMENEZ, ROBERT RODRIGUEZ NICHOLAS CAMACHO, FRANK GONZALEZ, and LOUIE ROJAS,** | § | **CIVIL ACTION NO. SA-00-CA-0517 HG** |
| **Plaintiffs,** | § | |
| **v.** | § | |
| **UNITED STATES DEPARTMENT OF DEFENSE, WILLIAM S. COHEN, Secretary of Defense, UNITED STATES DEPARTMENT OF THE AIR FORCE; F. WHITTEN PETERS, Secretary of the Air Force; SAN ANTONIO AIR LOGISTICS CENTER, PAUL L. BIELOWUICZ, Major General, San Antonio Air Logistics Center; DEFENSE LOGISTICS AGENCY; and UNITED STATES OFFICE OF PERSONNEL MANAGEMENT,** | § | |
| **Defendants.** | § | |

## MEMORANDUM AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

(Filed May 31, 2001)

**TO: Honorable H.F. Garcia**
**United States District Judge**

Before me is defendants' motion to dismiss, or alternatively, for summary judgment, filed September 8, 2000 (Docket Entry No. 12); plaintiffs' response, filed October 4, 2000 (Docket Entry No. 16) and reply briefs filed by both parties in the case.[1] Plaintiffs, "preference eligible" veterans[2] and former civil service employees at the Kelly Air Force Base ("AFB"), bring this lawsuit to challenge the Department of Defense's ("DoD") Priority Placement Program ("PPP"), as administered by the Civilian Personnel Office, San Antonio Air Logistics Center, at Kelly AFB, in San Antonio, Texas.[3] The gravamen of plaintiffs' complaint in this suit is that the PPP is required, but fails to, give priority placement to preference eligible veterans in making placements within the DoD. According to plaintiffs, the PPP violates the provisions of the Veterans' Preference Act of 1944 ("VPA") applicable to retention decisions.[4] The named-plaintiffs maintain that had the DoD factored in a veterans' preference eligibility criteria in

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[1] Defendants filed a reply to plaintiffs' summary judgment response (Docket Entry No. 21) to which plaintiffs filed a sur-reply (Docket Entry No. 23).

[2] It should be noted that defendants do not dispute that the plaintiffs are "preference eligible" veterans as the term is defined under 5 U.S.C. § 3502.

[3] Docket Entry No. 3.

[4] 5 U.S.C. §§ 1302 & 3502 (2000).

its PPP, they would have been placed in available positions within agency.[5]

The relevant facts of the case are not in dispute. Both parties also agree that the sole legal issue, which could be dispositive of the entire case, is whether the DoD is required, either by current statutory and/or regulatory mandate, to include a veterans' preference factor in its PPP. In that regard, plaintiffs have acknowledged that the current regulations issued by the Office of Personnel Management ("OPM") to further implement the goals of the Veterans' Preference Act ("VPA"), do not control the PPP's policies and procedures.[6] Thus, plaintiffs in essence request that the court direct OPM to draft the necessary regulations which would guarantee them an additional veterans' preference in the DoD's PPP.[7]

After carefully reviewing the applicable law and the legal arguments asserted by both parties, and mindful of

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[5] Even though defendants have also moved for dismissal, or alternatively for summary judgment, on the grounds that the plaintiffs have not established any legally redressable injury because they were not matched for vacant positions in the PPP, the court abated entering a ruling on that issue at the request of both parties. Docket Entry No. 30. The abatement was requested due to the legitimate need of plaintiffs to conduct more discovery on the issue in order to properly respond to defendants' summary judgment motion. Docket Entry Nos. 24 & 29. The parties have also acknowledged that defendants' first asserted ground for seeking summary judgment, if granted, would dispose of the entire case. Docket Entry No. 12, at 11-17. Thus, this Memorandum is limited to a discussion of Defendants' first summary judgment issue: whether a legal basis exists for plaintiffs' claim that they are entitled to a veterans' preference in the PPP. *Id.*

[6] Docket Entry No. 3, at ¶¶ 10-11.

[7] *Id.* at ¶ 39.

the court's limited role of interpreting existing law, I recommend that the District Court *grant* defendants' summary judgment motion. The plaintiffs have failed to demonstrate a statutory basis for their claim that they were guaranteed a veterans' preference in the DoD's PPP. They have relied on only two statutory provisions, 5 U.S.C. § 1302 (granting OPM with the authority to issue the necessary regulations for the implementation of the VPA) and 5 U.S.C. § 3502 (defining the rights of preference eligible veterans in a reduction-in-force situation). These two provisions do not apply to the PPP. Plaintiffs, in essence, are requesting that the court enter a decree ordering OPM to enact new regulations to include a veterans' preference in the PPP. The PPP, however, is an internal program created and administered by the DoD to assist their displaced employees by matching their job skills with vacant positions within the agency. The program is not governed by any statute, regulation, or rule, requiring that veterans' preference be one of the qualification factors considered in the PPP.[8] Indeed, the undisputed facts of this case demonstrate that as preference eligible veterans, plaintiffs were given preferential treatment to the extent allowed by Congress (*i.e.*, at their initial appointments to civil service employment and during the reduction-in-force ("RIF") at Kelly AFB, as mandated by 5 U.S.C. § 3502).[9] The role of the courts is not to create, but rather to interpret and enforce existing laws as enacted by Congress. Finding that there is no justiciable controversy

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[8] *Id.* at ¶¶ 38-39.

[9] Docket Entry No. 12, Exhibit 10, at 2.

in this case, I recommend to the District Court that summary judgment be *granted* in favor of defendants.

I have jurisdiction to enter this Memorandum and Recommendation under 28 U.S.C. § 636(b) and the District Court's Order referring all pretrial matters in this proceeding to me for disposition by order or to aid in their disposition by recommendation where my authority as a Magistrate Judge is statutorily constrained.[10]

## II. Jurisdiction

Plaintiffs predicate jurisdiction of this court on various statutes: 28 U.S.C. § 1331, as an action arising under the laws of the United States; 28 U.S.C. § 1346(a)(2), as a claim against the United States founded upon any act of Congress, or any regulation of an executive department; 28 U.S.C. § 1361, as an action in the nature of mandamus to compel officers or employees of the United States or any agency thereof to perform a duty owed to plaintiffs; 28 U.S.C. § 1651(a), as seeking issuance of all writs necessary in aid of the court's jurisdiction; 28 U.S.C. § 2201, as seeking declaratory judgment; and 5 U.S.C. § 3330b (Veterans' Employment Opportunities Act of 1998), as a suit over violations of veterans' preference laws.[11] Accordingly, this court has original jurisdiction, pursuant to 28 U.S.C. § 1331, to determine whether plaintiffs have failed to plead any statutory and/or regulatory authority affording them with a legal right to challenge the PPP in federal court.

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[10] Docket Entry No. 7.

[11] Docket Entry No. 3, at 4.

## III. Statement of the Case

The plaintiffs in this action have brought into question the legal merits of the PPP. The PPP is an internal administrative DoD program, established and operated by DoD directives to provide additional placement assistance to DoD employees who are involuntarily separated or downgraded because of downsizing actions.[12] Importantly, the PPP policies and procedures are not controlled by statute, regulation or executive order, but rather its applicability remains within the exclusive direction (and at the discretion) of the DoD.[13] According to the evidence of record, the program has been in existence since 1965 when the Secretary of Defense at the time decided that all DoD managers place their job vacancies in a centralized automated database.[14]

The program begins by placing the applications of those DoD employees who are subject to displacement – whether by a RIF or otherwise – in a centralized automated database.[15] A DoD employee subject to displacement

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[12] Indeed, the policy behind the PPP is to avoid adverse effects, to the extent possible, on DoD employees "caused by such actions as, but not limited to, reductions-in-force (RIFs), base closures, reassignments, consolidations, contracting-out actions, position classification decisions, rotation from overseas assignments, and transfers of function (TOFs)." Docket Entry No. 16, Exhibit 5, Chapter 1800, Department of Defense, Priority Placement Program, June 30, 1998, DoD 1400.25-M, Section C, "Policy." Through a consolidated PPP, the DoD offers affected employees alternative employment opportunities with the agency. ***Id.***

[13] Docket Entry No. 12, at 2 & Exhibit 3, ¶ 3.

[14] ***Id.*** at Exhibit 2, ¶ 2.

[15] ***Id.*** at Exhibit 2, ¶ 3. Indeed, according to the sworn testimony of one of the DoD-PPP's coordinators, in the case of a RIF, the DoD

(Continued on following page)

can register with the PPP before the time of his or her scheduled displacement, and normally remains in the PPP automated database for a period of one year after separation from employment.[16] At the time the employee registers for the PPP, he or she is required to identify other DoD locations to which reassignment or change to a lower grade would be accepted, and to also identify job skills he or she possesses for a possible "matching" with available positions within the agency.[17] The PPP is neutral in operation, in that it only considers the employees' job skills and how these skills meet the specifications of available agency positions.[18] It is undisputed that the PPP does not give

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employee will be automatically registered in the PPP upon receipt of a RIF notice. ***Id.***

[16] Docket Entry No. 12, at 2 & Exhibit 2, ¶ 3. For example, according to the sworn affidavits of two of the plaintiffs, they were registered in the PPP at least three years before their actual separation from employment. Docket Entry No. 16, at Exhibit 7, Cipriano Galvan's affidavit, in which he states that he first registered in the PPP subsequent to receiving his RIF notice, sometime in June of 1995 and his actual date of separation from employment was June 17, 1999; and Exhibit 8, Armando Tellez' affidavit, in which he states that after receiving his RIF notice in March of 1995, he registered in the PPP sometime in 1996. Tellez's actual date of separation from employment was July 2, 1999. ***Id.***

[17] The DoD's PPP applies to the Office of the Secretary of Defense, the Military Departments, the Chairman of the Joint Chiefs of Staff, the Combatant Commands, the Inspector General of the Department of Defense, the Defense Agencies, and the DoD Field Activities (collectively known as the "DoD Components"). Docket Entry No. 16, Exhibit 5, DoD Directive 1400.25-M.

[18] Docket Entry No. 12, at 3 & Exhibit 4, at ¶ 4. For instance, contrary to the regulatory factors that an agency must consider for purposes of implementing retention priority in a RIF situation, such as tenure of employment, military preference, length of service, and efficiency or performance ratings, the DoD is not required by law to

(Continued on following page)

preference eligible veterans any preferential treatment in making job matches and ultimate job placements.[19] The supervisor in charge of filling the open job position at issue has the discretion to hire any well-qualified candidate referred by the PPP's job matching process, irrespective of that candidate's veteran status.[20]

According to the procedural history of the case, this is not the first time that plaintiffs have attempted to challenge the PPP in federal court. The first legal challenge was brought on September 10, 1999 by plaintiffs' Union, the American Federation of Government Employees, Local 1617 ("AFGE").[21] The lawsuit was filed on the eve of massive layoffs of civil service employees (represented by the Union) scheduled to occur as part of the RIF procedures put in place to effectuate closing of the Kelly AFB.

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consider those factors in its PPP. 5 U.S.C. § 3502. ***See also Cuffee v. Office of Personnel Management***, 74 M.S.P.R. 24 (1997), where the Merits Systems Protection Board dismissed petitioner's claim that the PPP failed to take his seniority into account when making placements, finding that the OPM regulations, 5 C.F.R. Part 330, Subpart F & § 3330.601(c), specifically exclude the program from coverage.

[19] ***See*** Docket Entry No. 3, at ¶¶ 8 & 9 & Docket Entry No. 12, at 3 & Exhibits 3 & 4.

[20] Docket Entry No. 12, Exhibit 4, at ¶ 4. Interestingly enough, defendants have presented summary judgment evidence reflecting that "[t]he placement rate and the separation rate of alleged preference eligibles at Kelly AFB is approximately the same. Of the 861 employees facing separation, 176 (20.4%) were veterans' preference eligibles. Similarly, 102 of the 188 PPP placements were preference eligibles (20.9%)." ***Id.*** at Exhibit 3, ¶ 6.

[21] According to defendants' assertions, AFGE represented eighteen of the nineteen plaintiffs in this lawsuit. It did not represent Mr. Louie Rojas because he was an employee of the Defense Logistics Agency. ***Id.*** at 3 & fn.3.

Specifically, the Union also moved for a temporary restraining order ("TRO") asking the court to enjoin the scheduled termination of over 100 preference eligible veterans.[22] The District Court to which the case was assigned granted the TRO as requested.[23] On September 20, 1999, the District Court, however, dissolved the TRO and dismissed the Union's complaint for lack of subject-matter jurisdiction pursuant to FED.R.CIV.P. 12(b)(1). The District Court found that the individual plaintiffs had not exhausted their administrative remedies, either to the Department of Labor or to the Office of Special Counsel, prior to bringing their lawsuit in federal court.[24] As a result, the District Court did not address the legal merits of the plaintiffs' challenge to the PPP. Subsequent to the District Court's Order dissolving the TRO, the RIF layoffs, which were originally scheduled to take place on September 11, 1999, were ultimately implemented on September 25, 1999.[25]

It is undisputed that at the time plaintiffs were affected by the September 1999 RIF, they were afforded a veterans' preference in retention, pursuant to 5 U.S.C. § 3502.[26] All of the employees entitled to a veterans' preference, including the plaintiffs, were provided their statutory entitlements to available placement opportunities,

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[22] *Id.* at 3 & Exhibit 5, Complaint, in Cause No. SA-99-CA-991-OG, at ¶ 11.

[23] Docket Entry No. 12, at 4 & Exhibit 6.

[24] *Id.* at Exhibit 6, at 5.

[25] Docket Entry No. 12, at 4.

[26] *Id.* at 5-6 & Exhibit 10, at 2.

and were considered for and offered placement opportunities based on their retention standing. This meant that during the RIF, plaintiffs, as well as all other preference eligible veterans impacted by the procedure, were able to retain their positions for a longer period of time than non-veteran employees.

The evidence further shows that nearly all of these employees, including the plaintiffs, were offered the opportunity to transfer to new duty locations with their jobs, at their current grade.[27] Those who elected not to transfer were automatically placed on the DoD's PPP upon receipt of their RIF notices.[28] Besides the PPP, there is also undisputed summary judgment evidence that Kelly AFB has had ongoing outplacement assistance programs since the base closure was announced in 1995.[29] Through these programs, employees, such as the plaintiffs, have had other opportunities, aside from the PPP, to seek and secure jobs.

According to plaintiffs' first amended complaint, and the complaint filed in the September 1999 lawsuit, plaintiffs have not challenged, nor do they do so in this lawsuit, defendants' implementation of the RIF procedures.[30] What

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[27] *Id.* at Exhibit 10, at 2 & Docket Entry No. 21, at 8.

[28] *Id.* Thus, the plaintiffs were able to participate in the PPP as soon as they received their RIF notices, taking full advantage of registering in the program while at the same time retaining their employment during the RIF.

[29] *Id.* at Exhibit 10.

[30] Docket Entry No. 16, Exhibit 1 (Affidavit of Roy Castorano), at 6; Docket Entry No. 3, at 26 (Plaintiffs' First Amended Complaint, Allegations of Law); and Docket Entry No. 12, Exhibit 5 (Plaintiffs'

(Continued on following page)

plaintiffs claim in this lawsuit, as they did in their first, is that in addition to the preferential treatment afforded to them during the RIF phase, the defendants are also required by law to provide them with a veterans' preference in the PPP.

Having purportedly completed the administrative phase of their claims,[31] the plaintiffs bring the instant lawsuit seeking a ruling from the court that the PPP, as currently administered by the DoD and as applied to them during the RIF phase at the Kelly AFB, is legally unenforceable.

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September 1999 Complaint) & Exhibit 8 (Administrative Complaint of Juan Alvarez).

[31] According to defendants, and undisputed by plaintiffs, the Department of Labor addressed the claims of twelve plaintiffs on the merits, finding no legal basis for them. For instance, in denying plaintiff Juan Alvarez' administrative claim, the Department of Labor concluded:

> [T]he Priority Placement Program of the Department of Defense is not a statutory program and our research . . . shows that this program does not require veterans preference. As a non-statutory program the Priority Placement Program of the Department of Defense is not covered by the Veterans Employment Opportunit[ies] Act. This means that our agency does not have jurisdiction to address your complaint.

Docket Entry No. 12, at 5 & Exhibit 9, Letter dated November 9, 1999, from the Department of Labor to Alvarez. Defendants further state that the administrative claims brought by the other eighteen plaintiffs were legally the same as the one brought by Alvarez. ***Id.*** at 5 & fn.6. Defendants also state that the reason the Department of Labor or Office of Special Counsel did not reach the merits of the claims brought by the other seven plaintiffs was because these plaintiffs purportedly failed to respond to further requests for information. ***Id.*** Nevertheless, I will assume, without ruling, that the claims of those seven plaintiffs are properly before this court pursuant to the administrative procedures set forth in 5 U.S.C. §§ 3330a-b.

## IV. Issue Presented

Whether current law and related regulations mandate that the DoD factor in a veterans' preference in its PPP?

## V. Summary Judgment Standard

Because defendants rely on matters outside the pleadings, and having considered the same for purposes of entering this Memorandum and Recommendation, defendants' motion is treated for all purposes as one seeking summary judgment.[32] A party is entitled to summary judgment upon motion if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.[33] Mere allegations of a factual dispute between the parties will not defeat an otherwise proper motion for summary judgment; the requirement is that there be no genuine issue of material fact.[34] A fact is material if it might affect the outcome of the lawsuit under the governing law.[35] A dispute about a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the

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[32] FED.R.CIV.P. 12(b)(6).

[33] FED.R.CIV.P. 56(c); ***Celotex Corp. v. Catrett***, 477 U.S. 317, 322 (1986); ***Banc One Capital Partners Corp. v. Kneipper***, 67 F.3d 1187, 1198 (5th Cir. 1995); ***Neff v. American Dairy Queen Corp.***, 58 F.3d 1063, 1065 (5th Cir. 1995), ***cert. denied***, 516 U.S. 1045 (1996).

[34] ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, 247 (1986).

[35] ***Id.*** at 248. ***See also Thomas v. LTV Corp.***, 39 F.3d 611, 616 (5th Cir. 1994).

nonmoving party.[36] Therefore, summary judgment is proper if, under governing laws, there is only one reasonable conclusion as to the verdict; if reasonable finders of fact could resolve a factual issue in favor of either party, summary judgment should not be granted.[37]

A party seeking summary judgment bears the initial responsibility of informing the court of the basis for its motion and identifying those portions of the record which it believes demonstrate the absence of a genuine issue of material fact.[38] To satisfy this burden, the movant must either submit evidentiary documents that negate the existence of some material element of the nonmoving party's claim or defense, or if the crucial issue is one for which the nonmoving party will bear the burden of proof at trial, merely point out that the evidentiary documents in the record contain insufficient proof concerning an essential element of the nonmoving party's claim or defense.[39] Regardless of whether the moving party accompanies its summary judgment motion with affidavits or other evidentiary materials, the motion must be granted if the evidence before the court demonstrates that the

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[36] ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. at 248; ***Wise v. E.I. DuPont De Nemours & Co.***, 58 F.3d 193, 195 (5th Cir. 1995); ***MacMillian v. United States***, 46 F.3d 377, 380-81 (5th Cir. 1995).

[37] ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. at 249; ***Kunin v. Feofanov***, 69 F.3d 59, 61 (5th Cir. 1995); and ***Banc One Capital Partners Corp.***, 67 F.3d at 1198.

[38] ***Celotex Corp. v. Catrett***, 477 U.S. at 323; ***Wise***, 58 F.3d at 195; ***Burfield v. Brown, Moore, & Flint, Inc.***, 51 F.3d 583, 588 (5th Cir. 1995).

[39] ***Edwards v. Aguillard***, 482 U.S. 578, 595 n.16 (1987); and ***Celotex Corp. v. Catrett***, 477 U.S. at 325.

standard for entry of summary judgment, as set forth in Rule 56(c), is satisfied.[40]

Once the moving party has carried that burden, the burden shifts to the nonmoving party to show that summary judgment is not appropriate.[41] The nonmoving party cannot discharge this burden by referring to the mere allegations or denials of the nonmoving party's pleadings.[42] Rather, the nonmoving party's response must, either by submitting opposing evidentiary documents or by referring to evidentiary documents already in the record, set out specific facts showing the existence of a genuine issue for trial.[43]

## VI. Analysis

### A. Plaintiffs' First Amended Complaint

According to plaintiffs' First Amended Complaint, they assert the following legal allegations against defendants:

> The Defendants DEPARTMENT OF DEFENSE, WILLIAM COHEN, DEPARTMENT OF THE

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[40] ***Id.***

[41] ***Fields v. City of South Houston,*** 922 F.2d 1183, 1187 (5th Cir. 1991).

[42] FED.R.CIV.P. 56(e); ***Anderson v. Liberty Lobby, Inc.,*** 477 U.S. at 250; ***State of Texas v. Thompson,*** 70 F.3d 390, 393 (5th Cir. 1995).

[43] ***Celotex Corp. v. Catrett,*** 477 U.S. at 324; ***Fields,*** 922 F.2d at 1187; ***Neff v. American Dairy Queen Corp.,*** 58 F.3d at 1065; ***Engstrom v. First Nat'l Bank,*** 47 F.3d 1459, 1462 (5th Cir. 1995), ***cert. denied,*** 516 U.S. 818 (1995).

AIR FORCE, F. WHITTEN PETERS, SAN ANTONIO AIR LOGISTICS CENTER, DEFENSE LOGISTICS AGENCY, and PAUL L. BIELOWICZ have violated and are violating mandates of 5 U.S.C. § 1302 by failing and refusing to honor the veterans preference standing of the Plaintiffs as preference eligibles with respect to retention by failing and refusing to give preference to the Plaintiffs as preference eligibles in awarding opportunities for retention in employment through the Priority Placement Program.

The Defendant OFFICE OF PERSONNEL MANAGEMENT has violated and is violating its legal duty under 5 U.S.C. § 1302 by failing and refusing to promulgate regulations requiring the Defendants DEPARTMENT OF DEFENSE, WILLIAM COHEN, DEPARTMENT OF THE AIR FORCE, F. WHITTEN PETERS, SAN ANTONIO AIR LOGISTICS CENTER, DEFENSE LOGISTICS AGENCY, and PAUL L. BIELOWICZ to give preference to preference eligibles in awarding opportunities for retention in employment through the Priority Placement Program.

The Defendant OFFICE OF PERSONNEL MANAGEMENT has violated and is violating its legal duty under 5 U.S.C. §§ 1302 & 3502 by failing and refusing to promulgate adequate regulations to protect the preference status of the plaintiffs as preference eligibles in the context of the Kelly Air Force Base closing and similar closings.[44]

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[44] Docket Entry No. 3, at ¶¶ 32-34.

Plaintiffs further state that there is no adequate remedy at law for the injuries they have suffered and that they only seek redress in the form of equitable relief. Specifically, plaintiffs request that this court, in addition to entering declaratory judgment, also:

> [E]nter appropriate orders requiring the Defendants DEPARTMENT OF DEFENSE, WILLIAM COHEN, DEPARTMENT OF THE AIR FORCE, F. WHITTEN PETERS, SAN ANTONIO AIR LOGISTICS CENTER, DEFENSE LOGISTICS AGENCY, and PAUL L. BIELOWICZ (1) to reinstate them to positions of employment equivalent in pay and duties to those they occupied prior to separation or demotion, in the San Antonio metropolitan commuting area; (2) to accord them preference, as preference eligibles, over non-preference eligibles in the application of the Priority Placement Program, both retroactively and prospectively. . . .
>
> [E]nter appropriate orders requiring the Defendant OFFICE OF PERSONNEL MANAGEMENT (1) to promulgate regulations requiring the other Defendants to give preference to preference eligibles in offering opportunities for retention in employment through the Priority Placement Program; (2) to promulgate adequate regulations to protect the preference status of preference eligibles in the context of the Kelly Air Force Base closing. . . .[45]

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[45] *Id.* at ¶¶ 38-40.

B. Arguments of the Parties

Defendants have moved for summary judgment on the grounds that according to their own pleaded allegations, plaintiffs have made an admission that there is no legal basis for their claim of entitlement to a veterans' preference in the PPP. It is undisputed that plaintiffs did receive a veterans' preference in retention at the time of the RIF, and defendants maintain that this is the only preference to which they were legally entitled.[46] According to defendants, since the PPP is a non-statutory, intra-departmental job placement program created and administered by the DoD, plaintiffs' position that they are entitled to an additional veterans' preference, after they have already been accorded preferential treatment in retention at the time of the RIF itself, is not supported by law.[47]

Although plaintiffs do not dispute the defendants' description of the PPP, they argue that as a retention program, the law mandates that veterans be accorded preferential treatment in the program.[48] They further claim that the PPP's application has in essence done away with any preferential treatment conferred to veterans by statute. Specifically, plaintiffs claim that the RIF mechanism under the OPM regulations, 5 C.F.R. Part 351, is not suitable for base closures and operates, in conjunction

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[46] Docket Entry No. 12, at 5 & fn.5. Defendants further note that: "[i]n addition to the veterans' preference plaintiffs received at the time of the RIF, as preference eligibles, plaintiffs already would have received a veterans' preference at the time of their initial appointments to federal service." *Id.* & Exhibit 10, at 2.

[47] *Id.* at 11-17.

[48] Docket Entry No. 16, at 2-15.

with the PPP, to "wipe out" any veterans preference.[49] In that regard, they claim that the DoD has usurped the OPM's exclusive statutory authority under 5 U.S.C. § 1302 when it enacted the PPP.[50] Based on my review of the applicable law and the undisputed facts of this case, I cannot agree with plaintiffs' arguments.

Plaintiffs' claim for a veterans' preference in the PPP is not supported by any statutory authority and/or related regulations. Plaintiffs do not dispute that the PPP is an internal administrative DoD program, established and operated by DoD directives to provide additional placement assistance to DoD employees who are involuntarily separated or downgraded because of downsizing actions.[51] The PPP policies and procedures are not controlled by statute, regulation or executive order, but rather its applicability remains within the exclusive direction (and at the discretion) of the DoD.[52] The statutory authority on which plaintiffs rely in bringing this action does not afford them any additional veterans' preference than what was already afforded to them through the RIF phase. Plaintiffs'

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[49] *Id.* at 5-10. This argument runs contrary to a provision of plaintiffs' Master Labor Agreement which expressly states that in the event of a base closure, displaced employees will be afforded placement opportunities to the extent provided by the PPP. Docket Entry No. 12, at Exhibit 12, Master Labor Agreement between the Air Force Materiel Command and the American Federation of Government Employees entered on July 31, 1998 (and approved by the DoD on September 29, 1998), Article 39, § 39.03.

[50] Docket Entry No. 16, at 4.

[51] *Id.* at Exhibit 5, Chapter 1800, Department of Defense, Priority Placement Program, June 30, 1998, DoD 1400.25-M.

[52] Docket Entry No. 12, at 2 & Exhibit 3, ¶ 3.

request that this court order the OPM to issue new regulations to require the DoD and the other defendants in this action to provide them with a veterans' preference in the PPP, both "retrospectively and prospectively," demonstrates that no legal authority currently exists in support of their position.[53] In essence, plaintiffs request this court to assume the legislative authority of Congress. This is obviously beyond the scope of this court's authority.

C. Plaintiffs' Legal Authorities

Plaintiffs have premised the jurisdiction of this court on the Veterans' Employment Opportunities Act of 1998, 5 U.S.C. §§ 3330a & 3330b. Under this statute, the plaintiffs can only seek judicial redress if their rights have been violated "*under any statute or regulation relating to veterans' preference.*"[54] Thus, plaintiffs must first establish that their alleged veterans' preference rights were violated under a particular statute or regulation. Plaintiffs have failed to meet this threshold requirement.

According to plaintiffs' pleaded grounds, they admit that their veterans' preference rights in the PPP can only derive from two provisions of the VPA: 5 U.S.C. §§ 1302 & 3502.[55] Contrary to plaintiffs' assertions, neither of these provisions expressly provides for a veterans' preference with respect to the PPP.[56]

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[53] Docket Entry No. 3, at ¶ 36.

[54] 5 U.S.C. § 3330a(a)(1).

[55] Docket Entry No. 3, at ¶ 34.

[56] In addition, as the agency in charge of investigating complaints that preference rights of veterans have been violated, due deference is

(Continued on following page)

For instance, section 1302 grants authority to the OPM to:

> [P]rescribe and enforce regulations for the administration of the provisions of this title, and Executive orders issued in furtherance thereof, that implement the Congressional policy that preference shall be given to preference eligibles in certification for appointment, and in appointment, reinstatement, reemployment and retention, in the competitive service in Executive agencies, permanent or temporary, and in the government of the District of Columbia.[57]

Consequently, OPM has no authority to promulgate regulations concerning veterans' preference rights *unless* it receives an express statutory mandate from Congress.[58] Plaintiffs' argument that the OPM violated § 1302 by not prescribing regulations giving a veterans' preference right in the PPP, is not persuasive because such program is not required by statute (Title 5) or by executive order. As the Fifth Circuit has pointedly noted: "The Veterans Preference Act does not cloak veterans with any 'penumbral rights'; its provisions are necessarily specific, and for claimants to benefit from them they must show themselves to be clearly within the ambit of those provisions."[59]

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given to the Department of Labor's conclusion that there is no legal basis for plaintiffs' claims. Docket Entry No. 12, at 11 & Exhibit 9.

[57] 5 U.S.C. § 1302(b). ***See also*** § 1302(c).

[58] Plaintiffs have not pleaded a violation of any executive orders in the DoD's implementation of the PPP. Docket Entry No. 3, at ¶¶ 32-34.

[59] ***See Jackson v. United States Postal Service***, 666 F.2d 258, 261 at fn.5 (5th Cir. 1982) (citing ***Crowley v. United States***, 527 F.2d 1176, 1182 (Ct. Cl. 1975)).

Before the OPM can exercise its authority to implement additional veterans' preference regulations in this area, there must first be a statute expressly authorizing OPM's actions. In fact, the OPM regulations as now written, excepts the DoD from coverage.[60]

Moreover, based on a reading of the plain language of the statute, it becomes apparent that § 1302 gives no specific preference rights at all. The provision contains only a general statement of policy, a listing of preferred groups, and a specification of federal positions covered. It provides that "preference shall be given . . . in certification for appointment, appointment, [sic] reinstatement, reemployment and retention;" it does not delineate what that preference shall be.[61] The details are spelled out in

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[60] ***See*** 5 C.F.R. § 330.902(a)(1), Subpart I – *Full Consideration of Displaced Defense Employees,* expressly excepting from coverage the DoD. This was the same regulation relied upon by the Department of Labor in dismissing plaintiff Alvarez' administrative claim. Docket Entry No. 12, at Exhibit 9.

[61] ***See Brannan v. Elder,*** 341 U.S. 277, 284 (1951) (interpreting 5 U.S.C. § 851, the predecessor of 5 U.S.C. § 1302) (citing ***Hilton v. Sullivan,*** 334 U.S. 323 (1948)). Plaintiffs rely heavily on ***Hilton*** to argue that the VPA must be construed to confer an unlimited and unconditional retention or preference right in veterans. Docket Entry No. 16, at 12-14. In reading ***Hilton,*** it appears that the Court was dealing with the preference veterans have over non-veterans, *not* with an absolute claim by veterans to retention under any and all circumstances. ***See Fass v. Gray,*** 197 F.2d 587, 591 (D.C. Cir.) (where the court held that veterans do not have an unlimited and unconditional retention preference right in RIF cases, immune from any rule-making power of the Civil Service Commission [what is now the OPM]), ***cert. denied,*** 344 U.S. 839 (1952). ***Hilton*** simply does not support plaintiffs' alleged entitlement to an additional veterans' preference in the PPP. ***See also*** defendants' discussion of ***Hilton,*** docket entry no. 21, at 14-15.

subsequent provisions of the Act, mainly, the retention preference rights given to preference eligible veterans in a RIF situation, as prescribed by § 3502 of the Act. Therefore, besides setting the parameters for OPM to prescribe and enact regulations to implement the stated Congressional language of Title 5, § 1302, in and of itself, does not confer any specific legal rights on plaintiffs.

Plaintiffs maintain the PPP is implemented under the auspices of Title 5 because the DoD directive which describes the policies and procedures of the PPP specifically cites to 5 U.S.C. § 301. Section 301, entitled "Departmental regulations" sets forth the general criteria that executive or military departments must follow when enacting internal regulations, such as the PPP. The citing of that provision in the DoD directive does not provide plaintiffs with any legal rights to obtain the relief sought in this case.

With respect to the other statute relied upon by plaintiffs, 5 U.S.C. § 3502, that provision's plain language indicates that its scope is limited to veterans' preference in retention as it applies to employees who were "competing" in a *reduction-in force* situation. Pursuant to § 1302, OPM has specifically promulgated regulations, 5 C.F.R. Part 351, implementing this statutory mandate. It is undisputed that Defendants in this case fully complied with the veterans' preference requirements of § 3502 when the September 1999 RIF was implemented at the Kelly AFB.[62] Indeed, plaintiffs do not allege that their veterans'

[62] Docket Entry No. 12, at Exhibit 10.

preference rights were violated during the RIF's implementation.[63] Because § 3502 is limited to the RIF process, any claims concerning the PPP are beyond the scope of the statute.[64]

The legislative history of the Veterans' Employment Opportunities Act of 1998, as cited by the defendants, further supports my analysis. Prior to adoption of the Act in 1998, the House of Representatives earlier considered proposed legislation as the Veterans' Employment Opportunities Act of 1997. Specifically, the House considered what plaintiffs seek in this case, namely, a provision which would have extended veterans' preference rights to the PPP and which would have provided preference eligibles with additional protection beyond the OPM regulations which implement the 5 U.S.C. § 3502:

> H.R. 240 . . . provides preference eligibles with increased protections during reductions in force (RIF), [and] requires agencies to establish priority placement programs for employees affected by a RIF. . . . The Committee also believes it is necessary to provide eligible veterans with stronger rights to move into other positions if they are released from their own jobs during a RIF. . . . In addition, the legislation provides preference eligibles with enhanced assignment rights to other positions and requires agencies to establish

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[63] Docket Entry No. 3, at ¶¶ 32-34. Further, even if plaintiffs were to bring any challenges to the RIF in this case, they failed to exhaust their administrative remedies with regard to those claims, and as such, any complaints about RIF procedures are not properly before this court.

[64] *See Brannan*, 341 U.S. at 282-84.

> priority placement programs for preference eligibles who are separated as a result of a RIF.[65]

The proposed legislation, which would have granted the veterans' preference rights plaintiffs seek in this case, however, was rejected and never became law. The consideration by Congress, but failure to pass into law, of a more specific veterans' preference statutory language, applying expressly to the PPP, further supports my conclusion that there is no legal basis for the veterans' preference sought by plaintiffs in this case.[66]

Also, plaintiffs' argument that by the very nature of the RIF process, they were not able to fully participate in the PPP, is not supported by the record.[67] These plaintiffs were allowed to register in the PPP as soon as they received their RIF notices, taking full advantage of registering in the program while at the same time retaining their employment during the RIF for a longer period of time than non-veteran employees. In fact, according to the sworn testimony of plaintiffs Galvan and Tellez, they were registered in the PPP for almost three years prior to their actual termination dates.[68] Just because the plaintiffs did

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[65] Docket Entry No. 12, at 15-16 & Exhibit 11, House Report 105-40 Part I (March 20, 1997).

[66] ***See also Brannan***, 341 U.S. at 285 (where the United States Supreme Court rejected a similar claim to extend veterans' preference rights beyond the express statutory confines of § 12, the predecessor of § 3502).

[67] Docket Entry No. 16, at 4-10.

[68] ***Id.*** at Exhibits 7 & 8.

not find placement through the PPP, does not make it an unlawful program.[69]

D. The PPP is subject to the discretion of the DoD

According to a recent decision interpreting the VPA, internal employment decisions (as those made by the DoD through the PPP), involving transfers, promotions and relocations, are within the discretion of the agency and are not ordinarily the subject of judicial review. In ***Brown v. Department of Veterans Affairs***,[70] a group of military veterans who held employment positions with the Department of Veterans Affairs ("DVA"), and who had been passed over for promotions, petitioned for remedial action, alleging that the DVA failed to accord them veterans' preference points. The Merit Systems Protection Board (MSPB) denied the petitions at the administrative level. The petitioners then sought judicial review of the decision. The Federal Circuit Court of Appeals, in affirming the MSPB's decision found that petitioners failed to state a claim upon which relief can be granted.[71] The dismissal of the petition was premised on the court's holding that veterans are not accorded any preference under the VPA when seeking promotion or intra-agency transfers.[72] In

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[69] Docket Entry No. 12, at Exhibit 4, describing in more detail the plaintiffs' individual application and placement through the PPP.

[70] 247 F.3d 1222 (Fed. Cir. 2001).

[71] ***Id.*** at 1222-25.

[72] Similar to the VPA, the court also found that the Vietnam Era Veterans' Readjustment Assistance Act of 1974 ("VEVRAA"), 38 U.S.C. § 4214(b)(1), accords veterans' preference only for initial employment. ***Id.*** at 1224.

reaching its decision, the court noted that although the granting of preference to veterans in certain aspects of public employment is an established principle of law (*i.e.*, special point and service credit preferences), they are not entitled to limitless rights and benefits.[73] In support of its holding, the court cited to other case decisions that have determined that, under the VPA, veterans' preference "does not apply to an employee's transfer or other intra-agency movement."[74] Similarly, as the PPP only deals with movement of incumbent employees from one job to another within the DoD, the VPA does not accord the plaintiffs in this case with any veterans' preference rights.[75]

## VII. Conclusion

Based on the foregoing, I recommend that defendants' motion for summary judgment (Docket Entry No. 12) be

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[73] *Id.* at 1224 (citing *Crowley*, 527 F.2d at 1184, where the Court of Claims declined to accord veterans' preference under the VPA stating, "[t]here is perhaps no principle more settled in this area of the law than that promotion and non-promotion of employees within a department or agency of Government is a matter of supervisory discretion not ordinarily subject to judicial review.").

[74] *Id.* (quoting *Bates v. Runyon*, 97 F.3d 1464, 1464 (10th Cir.1996). *See also Glenn v. United States Postal Service*, 939 F.2d 1516, 1523 (11th Cir.1991) ("[V]eterans' preference only applies to initial employment, not to movement of an incumbent employee from one job to another within an agency."); *Stephens v. Coleman*, 712 F.Supp. 1571, 1581-82 (N.D. Ga. 1989) ("[N]either the [VPA] nor the regulations thereunder accord veterans preferential treatment in promotions."), *cert. denied*, 498 U.S. 998 (1990).

[75] Indeed, plaintiffs have failed to cite any case authority in support of their proposition that veterans are entitled to placement preference in internal programs such as the PPP.

***GRANTED***. Plaintiffs have failed to establish that existing law creates a veterans' preference right in the PPP.[76]

## VIII. Instructions For Service And Notice of Right to Object/Appeal

The United States District Clerk shall serve a copy of this Memorandum and Recommendation on each and every party either (1) by certified mail, return receipt requested, or (2) by facsimile if authorization to do so is on file with the Clerk. According to 28 U.S.C. § 636(b)(1) and FED. R. CIV. P. 72(b), any party who desires to object to this report must serve and file written objections to the Memorandum and Recommendation within 10 days after being served with a copy unless this time period is modified by the District Court. A party filing objections must specifically identify those findings, conclusions or recommendations to which objections are being made and the basis for such objections; the District Court need not consider frivolous, conclusive or general objections. **Such party shall file the objections with the Clerk of the Court, and serve the objections on all other parties and the Magistrate Judge**. A party's failure to file written objections to the proposed findings, conclusions and recommendations contained in this report shall bar the party from a *de novo* determination by the District

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[76] In light of my recommendation on plaintiffs' substantive claims, it is unnecessary to address defendants' motion to dismiss plaintiff Louie Rojas' claims for his untimeliness in exhausting his administrative remedies. Docket Entry No. 12, at 22-23.

Court.[77] Additionally, any failure to file written objections to the proposed findings, conclusions and recommendations contained in this Memorandum and Recommendation within 10 days after being served with a copy shall bar the aggrieved party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the District Court.[78]

**SIGNED** this 31 day of May, 2001.

/s/ Nancy Stein Nowak
**NANCY STEIN NOWAK**
**United States**
**Magistrate Judge**

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[77] ***See Thomas v. Arn***, 474 U.S. 140, 149-152 (1985); and ***Acuna v. Brown & Root, Inc.***, 200 F.3d 335, 339 (5th Cir.), ***cert. denied***, 530 U.S. 1229 (2000).

[78] ***Douglass v. United Servs. Auto. Ass'n***, 79 F.3d 1415, 1428-29 (5th Cir.1996) (en banc).

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF TEXAS**
**SAN ANTONIO DIVISION**

| | | |
|---|---|---|
| **CIPRIANO GALVAN, JUAN M. ALVAREZ, ARMANDO TELLEZ, RALPH G. MACIEL, RONALD MASON, SANTIAGO QUINONES, ROBERT VASQUEZ, JUAN MARTINEZ, CARLOS M. ROJAS, FRANK G. BESA, GILBERTO CAMACHO, REYNALDO DE LEON, HECTOR BUSTOS, JOE DIMAS, RICHARD JIMENEZ, ROBERT RODRIGUEZ, NICHOLAS CAMACHO, FRANK GONZALEZ, and LOUIE ROJAS,** | § | |
| **Plaintiffs,** | § | **CIVIL ACTION NO.** |
| **v.** | § | **SA-00-CA-0517 HG** |
| **UNITED STATES DEPARTMENT OF DEFENSE, WILLIAM S. COHEN, Secretary of Defense, UNITED STATES DEPARTMENT OF THE AIR FORCE; F. WHITTEN PETERS, Secretary of the Air Force; SAN ANTONIO AIR LOGISTICS CENTER, PAUL L. BIELOWICZ, Major General, San Antonio Air Logistics Center; DEFENSE LOGISTICS AGENCY; and UNITED STATES OFFICE OF PERSONNEL MANAGEMENT,** | § | |
| **Defendant.** | § | |

**ORDER**

(Filed May 31, 2001)

All matters for which this cause was referred to the Magistrate Judge having been considered and acted upon,

It is **ORDERED** that the above-entitled and numbered cause be, and it hereby is, **RETURNED** to the district court for all purposes.

**SIGNED** this 31 day of May, 2001.

/s/ Nancy Stein Nowak
**NANCY STEIN NOWAK**
**UNITED STATES**
**MAGISTRATE JUDGE**

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF TEXAS**
**SAN ANTONIO DIVISION**

| | | |
|---|---|---|
| CIPRIANO GALVAN, JUAN M. ALVAREZ, ARMANDO TELLEZ, RALPH G. MACIEL, RONALD MASON, SANTIAGO QUINONES, ROBERT VASQUEZ, JUAN MARTINEZ, CARLOS M. ROJAS, FRANK G. BESA, GILBERTO CAMACHO, REYNALDO DE LEON, HECTOR BUSTOS, JOE DIMAS, RICHARD JIMENEZ, ROBERT RODRIGUEZ, NICHOLAS CAMACHO, FRANK GONZALEZ, and LOUIE ROJAS, | * | |
| Plaintiffs, | * | |
| v. | * | Civil No. SA-00-CA-0517 HG |
| UNITED STATES DEPARTMENT OF DEFENSE, WILLIAM S. COHEN, Secretary of Defense, UNITED STATES DEPARTMENT OF THE AIR FORCE; F. WHITTEN PETERS, Secretary of the Air Force; SAN ANTONIO AIR LOGISTICS CENTER, PAUL L. BIELOWICZ, Major General, San Antonio Air Logistics Center; DEFENSE LOGISTICS AGENCY; and UNITED STATES OFFICE OF PERSONNEL MANAGEMENT, | * | |
| Defendants. | * | |

## ORDER

(Filed Aug. 17, 2001)

Before the Court is the Memorandum and Recommendation of the United States Magistrate Judge (Docket No. 33) in the above-styled and numbered cause, regarding defendants' motion to dismiss, or alternatively, for summary judgment, filed September 8, 2000 (Docket Entry No. 12); plaintiffs' response, filed October 4, 2000 (Docket Entry No. 16) and reply briefs filed by both parties in the case.[1] It is the conclusion of the Magistrate Judge that the defendants' motion for summary judgment be **GRANTED**. This Court accepts the conclusion by the Magistrate Judge that the Plaintiffs have failed to establish that existing law creates a veterans' preference right in the Priority Placement Program.

The Court fully accepts the conclusions reached by the Magistrate Judge and finds the recommendation to be neither clearly erroneous nor contrary to law. It is hereby ORDERED that the recommendation be adopted by this Court and the conclusions reached by the Magistrate Judge be incorporated herein.

Signed this 16th day of August, 2001.

/s/ H. F. Garcia
H. F. Garcia
United States District Judge

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[1] Defendants filed a reply to plaintiffs' summary judgment response (Docket Entry No. 21) to which plaintiffs filed a sur-reply (Docket Entry No. 23).

AO 450 (Rev. 5/85) Judgment in a Civil Case

**United States District Court**
**Western District of Texas**

Cipriano Galvan, et al.

Plaintiffs. JUDGMENT IN A CIVIL CASE

v.

United States Dept. of Defense, et al.

Defendants

CASE NUMBER: SA-0-CV-517 HG

(Filed Aug. 17, 2001)

☐ **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

**IT IS ORDERED AND ADJUDGED**

that defendant's summary judgment is granted; plaintiffs have failed to establish that existing law creates a veterans' preference right in the Priority Placement Program.

August 17, 2001
*Date*

William G. Putnicki
*Clerk*

Kathy Cavazos
*(By) Deputy Clerk*

5 U.S.C.A. § 1302

**UNITED STATES CODE ANNOTATED**
**TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES**
**PART II – CIVIL SERVICE FUNCTIONS AND RESPONSIBILITIES**
**CHAPTER 13 – SPECIAL AUTHORITY**

§ 1302. Regulations

**(a)** The Office of Personnel Management, subject to the rules prescribed by the President under this title for the administration of the competitive service, shall prescribe regulations for, control, supervise, and preserve the records of, examinations for the competitive service.

**(b)** The Office shall prescribe and enforce regulations for the administration of the provisions of this title, and Executive orders issued in furtherance thereof, that implement the Congressional policy that preference shall be given to preference eligibles in certification for appointment, and in appointment, reinstatement, reemployment, and retention, in the competitive service in Executive agencies, permanent or temporary, and in the government of the District of Columbia.

**(c)** The Office shall prescribe regulations for the administration of the provisions of this title that implement the Congressional policy that preference shall be given to preference eligibles in certification for appointment, and in appointment, reinstatement, reemployment, and retention, in the excepted service in Executive agencies, permanent or temporary, and in the government of the District of Columbia.

**(d)** The Office may prescribe reasonable procedure and regulations for the administration of its functions under chapter 15 of this title.

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5 U.S.C.A. § 3330b

**UNITED STATES CODE ANNOTATED**
**TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES**
**PART III – EMPLOYEES**
**SUBPART B – EMPLOYMENT AND RETENTION**
**CHAPTER 33 – EXAMINATION, SELECTION, AND PLACEMENT**
**SUBCHAPTER I – CERTIFICATION, AND APPOINTMENT**

§ 3330b. Preference eligibles; judicial redress

**(a)** In lieu of continuing the administrative redress procedure provided under section 3330a(d), a preference eligible may elect, in accordance with this section, to terminate those administrative proceedings and file an action with the appropriate United States district court not later than 60 days after the date of the election.

**(b)** An election under this section may not be made –

**(1)** before the 121st day after the date on which the appeal is filed with the Merit Systems Protection Board under section 3330a(d); or

**(2)** after the Merit Systems Protection Board has issued a judicially reviewable decision on the merits of the appeal.

**(c)** An election under this section shall be made, in writing, in such form and manner as the Merit Systems

Protection Board shall by regulation prescribe. The election shall be effective as of the date on which it is received, and the administrative proceeding to which it relates shall terminate immediately upon the receipt of such election.

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**UNITED STATES CODE ANNOTATED**
**TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES**
**PART III – EMPLOYEES**
**SUBPART B – EMPLOYMENT AND RETENTION**
**CHAPTER 35 – RETENTION PREFERENCE, RESTORATION, AND REEMPLOYMENT**
**SUBCHAPTER I – RETENTION PREFERENCE**

§ 3502. Order of retention

**(a)** The Office of Personnel Management shall prescribe regulations for the release of competing employees in a reduction in force which give due effect to –

**(1)** tenure of employment;

**(2)** military preference, subject to section 3501(a)(3) of this title;

**(3)** length of service; and

**(4)** efficiency or performance ratings.

In computing length of service, a competing employee –

**(A)** who is not a retired member of a uniformed service is entitled to credit for the total length of time in active service in the armed forces;

**(B)** who is a retired member of a uniformed service is entitled to credit for –

(i) the length of time in active service in the armed forces during a war, or in a campaign or expedition for which a campaign badge has been authorized; or

(ii) the total length of time in active service in the armed forces if he is included under section 3501(a)(3)(A), (B), or (C) of this title; and

(C) is entitled to credit for –

(i) service rendered as an employee of a county committee established pursuant to section 8(b) of the Soil Conservation and Allotment Act or of a committee or association of producers described in section 10(b) of the Agricultural Adjustment Act; and

(ii) service rendered as an employee described in section 2105(c) if such employee moves or has moved, on or after January 1, 1966, without a break in service of more than 3 days, from a position in a nonappropriated fund instrumentality of the Department of Defense or the Coast Guard to a position in the Department of Defense or the Coast Guard, respectively, that is not described in section 2105(c).

(b) A preference eligible described in section 2108(3)(C) of this title who has a compensable service-connected disability of 30 percent or more and whose performance has not been rated unacceptable under a performance appraisal system implemented under chapter 43 of this title is entitled to be retained in preference to other preference eligibles.

(c) An employee who is entitled to retention preference and whose performance has not been rated unacceptable under a performance appraisal system implemented

under chapter 43 of this title is entitled to be retained in preference to other competing employees.

**(d)(1)** Except as provided under subsection (e), an employee may not be released, due to a reduction in force, unless –

**(A)** such employee and such employee's exclusive representative for collective-bargaining purposes (if any) are given written notice, in conformance with the requirements of paragraph (2), at least 60 days before such employee is so released; and

**(B)** if the reduction in force would involve the separation of a significant number of employees, the requirements of paragraph (3) are met at least 60 days before any employee is so released.

**(2)** Any notice under paragraph (1)(A) shall include –

**(A)** the personnel action to be taken with respect to the employee involved;

**(B)** the effective date of the action;

**(C)** a description of the procedures applicable in identifying employees for release;

**(D)** the employee's ranking relative to other competing employees, and how that ranking was determined; and

**(E)** a description of any appeal or other rights which may be available.

**(3)** Notice under paragraph (1)(B) –

**(A)** shall be given to –

**(i)** the State or entity designated by the State to carry out rapid response activities

under section 134(a)(2)(A) of the Workforce Investment Act of 1998; and

**(ii)** the chief elected official of such unit or each of such units of local government as may be appropriate; and

**(B)** shall consist of written notification as to –

**(i)** the number of employees to be separated from service due to the reduction in force (broken down by geographic area or on such other basis as may be required under paragraph (4));

**(ii)** when those separations will occur; and

**(iii)** any other matter which might facilitate the delivery of rapid response assistance or other services under title I of the Workforce Investment Act of 1998.

**(4)** The Office shall prescribe such regulations as may be necessary to carry out this subsection. The Office shall consult with the Secretary of Labor on matters relating to title I of the Workforce Investment Act of 1998.

**(e)(1)** Subject to paragraph (3), upon request submitted under paragraph (2), the President may, in writing, shorten the period of advance notice required under subsection (d)(1)(A) and (B), with respect to a particular reduction in force, if necessary because of circumstances not reasonably foreseeable.

**(2)** A request to shorten notice periods shall be submitted to the President by the head of the agency involved, and shall indicate the reduction in force to which the request pertains, the number of days by which the

agency head requests that the periods be shortened, and the reasons why the request is necessary.

**(3)** No notice period may be shortened to less than 30 days under this subsection.

**(f)(1)** The Secretary of Defense or the Secretary of a military department may –

> **(A)** separate from service any employee who volunteers to be separated under this subparagraph even though the employee is not otherwise subject to separation due to a reduction in force; and
>
> **(B)** for each employee voluntarily separated under subparagraph (A), retain an employee in a similar position who would otherwise be separated due to a reduction in force.

**(2)** The separation of an employee under paragraph (1)(A) shall be treated as an involuntary separation due to a reduction in force.

**(3)** An employee with critical knowledge and skills (as defined by the Secretary concerned) may not participate in a voluntary separation under paragraph (1)(A) if the Secretary concerned determines that such participation would impair the performance of the mission of the Department of Defense or the military department concerned.

**(4)** The regulations prescribed under this section shall incorporate the authority provided in this subsection.

**(5)** No authority under paragraph (1) may be exercised after September 30, 2005.

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105th U.S. Congress; 1st Session
House Report 105-40
Part I (March 20, 1997)

I. Background and Need for Legislation

* * *

Testimony at these hearings revealed that veterans [sic] preference in the Federal workplace is often ignored or circumvented and that its continued viability is threatened on several fronts.

* * *

Veterans have born a disproportionate brunt of the governments [sic] downsizing.

* * *

Many veterans in the community have cited a variety of strategies recently used by agencies that threaten veterans [sic] preference whether that is their intended effect or not.

* * *

The committee also believes it is necessary to provide eligible veterans with stronger rights to move into other positions if they are released from their own jobs during a RIF.

* * *

Mr. Frelinghuysen:

* * *

My chief concern is that veterans' preference is being circumvented by many Federal agencies while they are

downsizing through what is known as the designer reduction in force, or designer RIF. Many RIF's are carried out by Federal agencies artificially tailoring job categories to make them uncompetitive, thereby negating the employment of veterans' preference in the first place.

* * *

Mr. Burton of Indiana:

* * *

Mr. Speaker, Congress intended for veterans' preference rules to help veterans compete for jobs in the Federal Government and to protect veterans' rights during reductions-in-force, or RIF's. Unfortunately, the Civil Service Subcommittee has found that the benefits of the original veterans' preference laws have been eroded. Agencies often ignore or find ways to circumvent veterans' preference directives. One way that agencies do this [is] to conduct special RIF's that are narrowly targeted to specific individuals, leaving those individuals with no opportunity to benefit from the veterans' preference or other rules that would enable them to compete to keep their jobs. This is not right.

* * *

Mr. Stump:

* * *

Over the years, some federal agencies have become very inventive when trying to avoid veterans' preference laws and regulations. Recently, with the pressure to downsize, agencies and hiring managers have found new ways to circumvent veterans' preference. A major reason agencies

and hiring managers have felt free to pursue such tactics is that there was no real consequence for their illegal actions.

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF TEXAS**
**SAN ANTONIO DIVISION**

| | | |
|---|---|---|
| **CIPRIANO GALVAN, JUAN M. ALVAREZ, ARMANDO TELLEZ, RALPH G. MACIEL, RONALD MASON, SANTIAGO QUINONES, ROBERT VASQUEZ, JUAN MARTINEZ, CARLOS M. ROJAS, FRANK G. BESA, GILBERTO CAMACHO, REYNALDO DE LEON, HECTOR BUSTOS, JOE DIMAS, RICHARD JIMENEZ, ROBERT RODRIGUEZ, NICHOLAS CAMACHO, FRANK GONZALEZ, and LOUIE ROJAS,** | * | |
| **Plaintiffs,** | * | **CIVIL ACTION NO. SA-00-CA-0517 HG** |
| **v.** | * | |
| **UNITED STATES DEPARTMENT OF DEFENSE; WILLIAM S. COHEN, Secretary of Defense; UNITED STATES DEPARTMENT OF THE AIR FORCE; F. WHITTEN PETERS, Secretary of the Air Force; SAN ANTONIO AIR LOGISTICS CENTER; PAUL L. BIELOWICZ, Major General, San Antonio Air Logistics Center; DEFENSE LOGISTICS AGENCY; and UNITED STATES OFFICE OF PERSONNEL MANAGEMENT,** | * | |
| **Defendants.** | * | |

## AFFIDAVIT OF CIPRIANO GALVAN

"I, CIPRIANO GALVAN, hereby declare and state under oath the following:

1. "I am CIPRIANO GALVAN, a Plaintiff in the above captioned case. I worked as an Aircraft Sheet Metal Mechanic Leader for the DEPARTMENT OF DEFENSE AND THE UNITED STATES AIR FORCE until I was involuntarily separated from my civil service employment on or about June 17, 1999. At the time of my separation, I had been employed in federal civilian service for approximately 19 years and had been working at Kelly Air Logistics Center, Kelly Air Force Base, Texas for approximately 19 years. At the time of my involuntary separation, I was a Wage Level (WL) 10, Step 5. I was part of the competitive service, with permanent tenure. I always received "Excellent" performance ratings. I even received monetary performance awards on several different occasions.

2. "I am a Vietnam Era veteran, which means that I am considered a veteran preference eligible under 5 U.S.C. § 3502, and I am afforded a "five point preference" as a result of my military service.

3. "To the best of my memory, I was enrolled in the Priority Placement Program (hereinafter "PPP") sometime in June 1995. This was shortly after the announcement of the Kelly Air Base closure in March 1995. It was my understanding that registration in the PPP at this time was mandatory, but I had to receive a reduction-in-force (hereinafter "RIF") notice before I could enroll in the PPP.

4. "Of the information I personally received regarding the PPP, I was never informed that the program would not take into account my veteran's status or preference. Other

co-workers and I were briefed on how the PPP worked. But through all of the briefings that we attended, not once was I told by anyone from the civilian personnel office or related offices about veteran preference, other programs, or protections. I was never personally "one-on-one" counseled by anyone with regard to the limitations, policy, or procedures associated with the PPP. Rather all of the information I received was while I was with groups of people.

5. "I was directed [sic] and did attend a mass assembly at an auditorium that covered other employment opportunities, programs, retraining, and the PPP. They discussed skills, qualifications, and wage levels. In short, we were told that we would have a better opportunity for selection if we were willing to accept a position at a lower wage level or at a different location. They never addressed veterans' preference. Rather, they provided a general overview of PPP, to include how it was set up, what we were required to do, and the registering process. When I left the assembly, I was still under the impression that my veterans' preference would still be taken into consideration under the PPP.

6. "Under the PPP, I registered for jobs in other areas or regions. Specifically, I volunteered for positions in Oklahoma, New Mexico, throughout the State of Texas, and even overseas assignments. I also offered to accept a position at a lower pay grade, in a different competitive category, or at a different agency. To the best of my memory, I relayed my willingness for wide areas of consideration with Ms. Mesa. She was the person that entered my information into a database. She asked if I was willing to accept a downgrade in position, and I replied, "Yes." She

also asked if I was willing to accept a job with the City of San Antonio, and again, I replied, "Yes."

7. "During the time I was enrolled in the PPP, I never received any telephone calls, letters, job offers or notices that I was a "best qualified" applicant. In fact, I was never once called by anyone in the federal government regarding any employment positions, permanent, temporary or otherwise.

8. "I felt that I was qualified to perform more than my last position as an Aircraft Sheet Metal Mechanic Leader, as I have had extensive training in numerous other areas, to include computer training, and experience as a training instructor at a GS level.

9. "During my federal civilian employment I supervised or monitored approximately 15 people at one time.

10. "While pending lay-off, I personally became aware of many of my co-workers who were offered positions. Most of these positions were located at Randolph Air Force Base, Texas. I also knew that there were positions at Fort Sam Houston, Brooke Air Force Base, and Lackland Air Force Base, Texas. All of these positions were in San Antonio. In fact, approximately ten acquaintances of mine were selected to work at these three locations, but primarily at Randolph Air Force Base. I noticed a lot of these individuals who were selected were non-veterans.

11. "One person in particular was hired at Randolph Air Force Base as a material clerk. Her name is Ms. Wiles. She had started out as a mechanic at Kelly Air Force Base, and then because of the PPP she was moved to Randolph to work as a GS level employee stocking parts. I would have accepted this position had I been offered. She is still

employed at the same position at Randolph Air Force Base. I know for a fact that she is not a veteran or preference eligible.

12. "Another acquaintance of mine, David Torres, was placed at Fort Sam Houston. He also started out as a sheet metal mechanic at Kelly Air Force Base. In fact, we worked side-by-side. I did not supervise him, but I did train him. I do not know his exact title, but he currently reads gauges at the Sam Houston power plant. I know for certain that he is also a non-veteran or preference eligible [sic].

13. "I am now working for a government contractor, making significantly less in pay and benefits than I was receiving from the federal government. Because of my limited tenure of 19 years, I also did not, and will not, receive any retirement benefits from the federal government. I was also removed from the PPP because the one-year time limit lapsed in 1999."

/s/ Cipriano Galvan
Cipriano Galvan

Before me, the undersigned authority, personally appeared CIPRIANO GALVAN, who stated upon his oath that the statements attributed to him in the above and foregoing affidavit are within his personal knowledge and are true and correct.

Subscribed and sworn to before me on this 29 day of September 2000.

/s/ Lord William Shepherd
Notary Public in and
for the State of Texas

[SEAL] LORD WILLIAM SHEPHERD
Notary Public
State of Texas
Comm. Exp. 06-04-2004

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF TEXAS**
**SAN ANTONIO DIVISION**

| | | |
|---|---|---|
| **CIPRIANO GALVAN, JUAN M. ALVAREZ, ARMANDO TELLEZ, RALPH G. MACIEL, RONALD MASON, SANTIAGO QUINONES, ROBERT VASQUEZ, JUAN MARTINEZ, CARLOS M. ROJAS, FRANK G. BESA, GILBERTO CAMACHO, REYNALDO DE LEON, HECTOR BUSTOS, JOE DIMAS, RICHARD JIMENEZ, ROBERT RODRIGUEZ, NICHOLAS CAMACHO, FRANK GONZALEZ, and LOUIE ROJAS,** | * | |
| **Plaintiffs,** | * | **CIVIL ACTION NO. SA-00-CA-0517-HG** |
| **v.** | * | |
| **UNITED STATES DEPARTMENT OF DEFENSE; WILLIAM S. COHEN, Secretary of Defense; UNITED STATES DEPARTMENT OF THE AIR FORCE; F. WHITTEN PETERS, Secretary of the Air Force; SAN ANTONIO AIR LOGISTICS CENTER; PAUL L. BIELOWICZ, Major General, San Antonio Air Logistics Center; DEFENSE LOGISTICS AGENCY; and UNITED STATES OFFICE OF PERSONNEL MANAGEMENT,** | * | |
| **Defendants.** | * | |

## AFFIDAVIT OF ARMANDO TELLEZ

"I, ARMANDO TELLEZ, hereby declare and state under oath the following:

1. "I am ARMANDO TELLEZ, a Plaintiff in the above captioned case. I worked as an Aircraft Sheet Metal Mechanic for the DEPARTMENT OF DEFENSE AND THE UNITED STATES AIR FORCE until I was involuntarily separated from my civil service employment on or about July 2, 1999. At the time of my separation, I had been employed in federal civilian service for approximately 18 years and had been working at Kelly Air Logistics Center, Kelly Air Force Base, Texas, for approximately 15 years. At the time of my involuntary separation, I was a Wage Grade (WG) 10, Step 5. I was part of the competitive service, with permanent tenure. I always received "Excellent" performance ratings. I even received monetary performance awards on several different occasions.

2. "I am a Vietnam Era veteran, which means that I am considered a veteran preference eligible under 5 U.S.C. § 3502, and I am afforded a "five point preference" as a result of my military service.

3. "To the best of my memory, I was enrolled in the Priority Placement Program (hereinafter "PPP") sometime in 1996. This was shortly after the announcement of the Kelly Air Base closure in March 1995.

4. "I was never informed that the PPP would not take into account my veteran's status or preference. I remember attending a briefing at the Duncan Center, but I do not recall the year. The briefing was held early on, sometime in 1995 or 1996. At the time, I really did not understand what was going on, as the process was very confusing to

me. Through all of the briefings that we attending, not once was I told by anyone from the civilian personnel office or related offices about veteran preference, other programs, or protections.

5. "We spoke one-on-one with a lady from personnel, I asked if I could be considered for other types of jobs. For instance, when I was in the military I was medical specialist. I asked her if I could drive ambulances or work at the Veterans' Administration. She stated that it all boiled down to the qualifications required for the job. While I thought I could perform this job, I was given the impression that finding a new job was not promising.

6. "While speaking to the lady from personnel, I also volunteered to accept other positions within San Antonio, such as Lackland AFB, Randolph AFB, and Fort Sam Houston. I also indicated that I would consider positions in surrounding cities, to include Corpus Christi, Del Rio, and Houston.

7. "I also told the lady that I would be willing to accept a lower pay grade or step, and a different position outside my job series.

8. "Since 1995, I have not received any telephone calls, letters, job offers or notices that I was a "best qualified" applicant. In fact, I was never once called by anyone in the federal government regarding any employment positions, permanent, temporary or otherwise. Other non-veterans that I knew and worked with were getting letters directly from their supervisor regarding job offers in Del Rio, Texas.

9. "While pending lay-off, I personally became aware of many of my co-workers who were offered positions. Most of

these positions were located at Randolph AFB, Fort Sam Houston, and Del Rio, Texas. All of these positions are in the San Antonio area that I requested consideration.

10. "A fellow co-workers, Roland Jimenez, was hired at Del Rio to perform the same duties that he performed at Kelly AFB. Specifically, he and I both were Aircraft Sheet Metal Mechanics at Kelly AFB. In fact, we were one the same crew. To the best of my knowledge, Mr. Jimenez is not a veteran or preference eligible. Had I been offered, I would have accepted this position, and I believe that I was qualified to perform the same duties that he was assigned.

11. "Two other sheet metal mechanics that I knew were offered jobs at Randolph AFB. Their names are John Ortiz and Kirk McBride. To the best of my knowledge, they are not veterans or preference eligible. I do not know what positions that they were offered. I previously worked on the same crew with Kirk McBridge, both as sheet metal mechanics. It is my believe that Mr. Ortiz and Mr. McBride took jobs that veterans could have performed.

12. "Another individual, David Torres, was hired to work at Fort Sam Houston. He previously worked at Kelly AFB as a sheet metal mechanic, but frequently worked other duties – often called "light duty" – due to many injuries he incurred while on the job. In my opinion, David Torres was not a stellar performed and was afraid to get dirty. It appeared to me as though he was always trying to get out of doing his job and work in general. He told me that he now reads gauges at Fort Sam Houston. To the best of my knowledge, David Torres is not a veteran. There is no doubt in my mind that I could perform any job that David Torres could perform. Had I been offered a position to read

gauges at Fort Sam Houston, I would have accepted the offer.

13. "Ms. Wiles, another former co-worker of mine from Kelly AFB, also received a federal job at Randolph AFB as a clerk in personnel. To the best of my knowledge, Ms. Wiles is not a veteran. While uncertain if my qualifications would permit me to take her job, I know other veterans who could have qualified to perform that job.

14. "I am now working for a government contractor, making significantly less in pay and benefits that I was receiving from the federal government. Because of my limited tenure of 18 years in civil service and because I am not yet 55 years old, I also did not, and will not, receive any retirement benefits from the federal government. I was also removed from the PPP because I accepted a position with the government contractor."

/s/ Armando Tellez
Armando Tellez

Before me, the undersigned authority, personally appeared ARMANDO TELLEZ, who stated upon his oath that the statements attributed to him in the above and foregoing affidavit are within his personal knowledge and are true and correct.

Subscribed and sworn to before me on this 29 day of September 2000.

/s/ Lord William Shepherd
Notary Public in and
for the State of Texas

[SEAL] LORD WILLIAM SHEPHERD
Notary Public
State of Texas
Comm. Exp. 06-04-2004

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

| | | |
|---|---|---|
| AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES LOCAL 1617, and ROY CASTORENO<br><br>Plaintiffs,<br><br>VS.<br><br>WILLIAM S. COHEN, SECRETARY OF DEFENSE, F. WHITTEN PETERS, ACTING SECRETARY OF THE AIRFORCE, PAUL L. BIELOWICZ, MAJOR GENERAL, OFFICE OF PERSONNEL MANAGEMENT AND THE UNITED STATES,<br><br>Defendants. | § | CIVIL ACTION NO. SA99CA0991OG |

## AFFIDAVIT OF ROY CASTORENO

"I, Roy Castoreno, hereby declare and state under oath the following:

1. "I am the president of American Federation of Government Employees (AFGE) Local 1617. I was elected to my office by the membership of AFGE Local 1617. AFGE Local 1617 is the exclusive representative of the bargaining unit of non-management federal civilian employees at Kelly Air Force Base, known technically as the San Antonio Air Logistics Center. Currently there are approximately 5,000 employees in the bargaining unit.

2. "Before serving as president I was an officer of AFGE Local 1617. Before serving as an officer I was a steward. I have served as Union representative for AFGE Local 1617 in the capacities of steward, officer, and president for approximately 18 years continuously. This has provided me 18 years of practical experience in labor-management relations at Kelly and in the mechanics and administration of federal personnel regulations.

3. "I have been continuously employed as a civilian employee of the Air Force at Kelly since May 17, 1977. My current job classification is WG-8602-10 Aircraft Engine Repair.

4. "Employees first began to receive notice of RIF's associated with the base closure in 1997. In the current RIF action, according to a list that management provided to the Union, 861 employees will be separated from their federal employment on September 11, 1999. With the exception of a few supervisors, the overwhelming majority of these individuals are bargaining unit employees. The attached Exhibit 2 is a version of the list provided by management of the impending terminations, which I have had sorted by retention group. The fact that these individuals are being separated means that no other jobs were offered to them by management, either through the Priority Placement Program (PPP), through vacancies at Kelly, or through bumping of lower-ranked employees.

5. "Exhibit 2 portrays the preference subgroup of each individual The preference subgroups are I-AD, I-A, I-B, II-AD, II-A, II-B, III-AD, III-A, III-B, and non-competitive service, with I-AD being the highest ranking group and the rest following in descending order. The preference subgroups are defined in 5 CFR § 351.501. The

designations "I, II, and III" are the tenure groups, with "I" being career employees, "II" being career-conditional, and "III" being indefinite appointments. The designations "AD, A, and B" refer to veterans preference status. "AD" is a preference eligible with at least 30% service-connected disability, "A" is a non-disabled preference eligible, and "B" is a non-preference eligible. Employees in each subgroup are supposed to have retention preference over employees in each lower subgroup.

6. "Exhibit 2 shows that 1 employee with a I-AD designation and 135 employees with a I-A designation are scheduled for separation from the payroll on September 11. These are the two highest groups of veterans preference standing, for a total of 136 career employees who are preference eligibles. Further, 40 employees with III-A designation – indefinite appointees who are preference eligibles, are scheduled for separation. This is a total of 176 veterans preference eligibles. There are many employees scheduled to remain employed after September 11 who have lower preference standing than the I-AD and the I-A veterans, and there are a considerable number who will be remaining who have lower preference standing than the III-A veterans, i.e. III-B's and non-competitive service employees. For example, there are and will be remaining at least as many temporary employees with no retention standing at all, as there are preference eligible veterans who are scheduled for layoff.

7. "Exhibit 3 attached hereto is a list that was recently provided to the Union by management showing the persons who have obtained PPP placement since November 1998. This is not all of the PPP placements, because there were placements before November 1998. Exhibit 3 is all that management claims is available to us

at this time. On August 11, 1998, I sent a data request to management in which I asked for a list of all PPP placements since the closure process began (Exhibit 4), but that information, like most of the information I asked for in that request, has not been provided yet.

8. "The Union has a list of all employees' names showing the preference group designations. There are 488 names listed on Exhibit 3. I compared Exhibit 3 with the list of all employees' names and preference groups. The latter is a bulky list but I can provide it to the Court if needed. Of those 488 employees that were placed through PPP, 118 were I-A's, 2 were I-AD's, and the other 368 were not preference eligibles.

9. "Exhibit 5 is a copy of the Priority Placement Program manual. In order to be eligible for PPP consideration, an individual must have received a RIF notice. Through PPP, a person who has received a RIF notice becomes eligible for other job opportunities throughout all branches of the Department of Defense, nationwide. PPP opportunities are prized by employees facing RIF because they provide the chance to secure continuation of one's federal civil service career and corresponding accrual of retirement benefits and other benefits. PPP treatment does not give any credit or preference to veterans preference standing. Veterans preference status is ignored in the PPP process. As seen by my analysis of Exhibit 3, most of the PPP placements have gone to non-preference eligibles. PPP offers are for vacancies only; there is no bumping through PPP. Thus, when a non-veteran takes a PPP placement, that vacancy is removed from the possibilities that would have been available to preference eligible veterans.

10. "Management gave 18 months advance notice to all employees who were potentially affected by the RIF that is culminating in the September 11 scheduled layoffs. The 861 who are now scheduled for separation are those from among that original pool who have received no placement or retention opportunities. Employees potentially affected by this RIF were able to begin applying for PPP placement 18 months ago when they received the advance notice. As has been shown, of the 488 who received PPP placement only 120 were I-AD and I-A preference eligibles, yet 136 employees from these high-ranking groups are facing job loss on September 11. The 368 **non-preference** eligibles who received PPP offers were given job opportunities that could have been given to the 136 high-ranking veterans if the PPP program recognized veterans preference standing. Many of the preference eligible veterans who are facing layoff on September 11 have had applications pending for PPP placement for virtually 18 months but have received no offers.

11. "As can be seen on Exhibit 3, a number of the PPP placements were to jobs in the San Antonio area, such as Randolph and Lackland Air Force Bases and Fort Sam Houston. San Antonio is a unique community in having so many Department of Defense installations in geographical proximity. Such job offers are particularly prized by employees. Job offers to other Department of Defense bases in the San Antonio area are not available through RIF bumping procedures, because management defined the competitive area, pursuant to 5 C.F.R. part 351, as Kelly Air Force Base only. Bumping to resolve a RIF is available only in the competitive area as defined by management. Under 5 C.F.R. § 351.402 management could have defined the competitive area as agency-wide,

meaning every Department of defense installation in the San Antonio commuting area. I do not know why management limited the competitive area to Kelly with so many neighboring Defense installations, or why management did not at least make all Air Force installations the competitive area. I do not agree with management's decision to so limit the competitive area but nevertheless that is what they did. (I am not challenging that particular decision in this lawsuit but I reserve my right to do so in the future in administrative proceedings.) As a result of that decision PPP is the only program permitting placement opportunities in the numerous neighboring Defense and Air Force installations and facilities in the San Antonio area. The 136 high preference-ranking veterans who are scheduled for separation on September 11 would have greatly prized such opportunities.

12. "The implementation of President Clinton's decision to permit privatization in place of the Kelly work load has proven to be a great disappointment to the employees whom I represent. Many employees who have applied to the private companies that are in the process of becoming established at the site of Kelly have been turned down. Many others have been offered jobs with significantly lower wages to do the same work they were doing as a government employee. Such employees are placed in a dilemma between taking a major pay cut to enter at-will employment with no enforceable right to job retention, or hanging on with the Air Force as long as they could so that they would accrue credit toward vested retirement benefits, with the hope that something would come through via PPP.

13. "I am respectfully requesting an injunction from the Court because I do not believe there is any possible

meaningful relief otherwise. If the preference eligibles who are scheduled for separation on September 11 are indeed separated as scheduled, the possibility of reinstatement after length litigation will do them no good, because Kelly is in the process of closing down and there will be no jobs for those individuals to come back to in one to two years. I am respectfully requesting the Court to restrain the September 11 layoffs until veterans preference rights are honored by either giving preference eligibles preference in PPP placement offers or utilizing new regulations from the OPM that better observe preference standing in the context of a base closure. I know that I cannot prevent the ultimate closure of Kelly and I am not seeking to do so in this lawsuit. My objective in this lawsuit is for the employees with veterans preference rights to have better opportunities of placement in other federal civilian jobs outside Kelly, as I believe is intended by the law in stating that preference eligibles must receive preference in retention, if they are forced from the payroll on September 11 in a mass layoff the possibility of reconstructing such opportunities later will be virtually impossible.

14. "As exclusive representative of the bargaining unit, the Union's duty is to pursue all lawful means to protect its members and constituents in conditions of employment. There is no more critical issue of conditions of employment than the difference between retaining and losing employment.

15. "Management has stated that the closure of Kelly will be complete, with the final elimination of federal civilian bargaining unit jobs, in September 2001. After the scheduled layoffs of September 11, if they take place, there will be between 4,000 and 5,000 remaining bargaining unit jobs. Thus there will be further large mass layoffs

over the next two years. The issues we are presenting will arise continually over the next two years.

16. "The Union did not file this lawsuit and motion for injunction before now because we did not have the necessary data to fully analyze the situation until this week, although we have been diligently seeking information from management. Although I sent management my written data request (Exhibit 4) on August 11, 1999, management did not provide me the list of employees to be separated (Exhibit 2) until September 7, 1999. Thus I did not have information as to the veterans' profile of those to be separated until September 7. Management did not give me the list of individuals who have been placed through PPP (Exhibit 3) until late in the afternoon of September 8, 1999. I immediately began researching the veterans preference status of the 488 names on that list, worked on that research until after midnight that night, then finished that analysis in the morning of September 9. Only then did I have hard data as to the extent to non-veterans obtaining PPP placement in preference to veterans.

17. I had requested both of these lists in my written data request of August 11 (Exhibit 4). Both of these lists should have been easy for management to provide promptly because such information must be kept current by management during the processing of a RIF. Upon reviewing these statistics it was obvious to me that preference eligible veterans have been denied opportunities to participate fully in PPP placement and are being unfairly designated for separation as a result. I asked legal counsel to pursue action on this ground as quickly as possible. I will add that management still has not provided most of the data requested in my August 11 request.

18. "I am familiar with grievance arbitration under our collective bargaining agreement. An arbitrator would have no power to order OPM or the Defense Department to issue or revise regulations."

/s/ Roy Castoreno
Roy Castoreno

Before me, the undersigned authority, personally appeared Roy Castoreno, who stated upon his oath that the statements attributed to him in the above and foregoing affidavit are within his personal knowledge and are true and correct.

Subscribed and sworn to before me on this 9th day of September 1999.

/s/ Oralia Castillo
Notary Public in and
for the State of Texas

[SEAL]
ORALIA CASTILLO
MY COMMISSION EXPIRES
August 13, 2000